RECENT AUSTRALIAN DECISIONS ON ARBITRATION

MLAANZ CONFERENCE - 17 SEPTEMBER 2015

Author: Richard Edwards, Partner

TCL Air Conditioner (Zongshan) Co Ltd v Castel Electronics Pty Ltd **[2014] FCAFC 83**
Decision date- 16 July 2014

TCL Air Conditioner (Zhongshan) Co Ltd ("**TCL**"), and Castel Electronics Pty Ltd ("**Castel**") had a general distribution agreement ("**GDA**") for the distribution of air conditioning units in Australia. Castel was the exclusive Australian distributor of TCL air conditioning units. A dispute arose as Castel claimed that TCL was selling unbranded air conditioning units in Australia in breach of the exclusivity agreement. The agreement between the parties stipulated that in the event a disagreement could not be resolved, the parties would submit to arbitration.

In 2010, the arbitration was heard by a panel of three arbitrators and a final award in favour of Castel was delivered on 23 December 2003. TCL applied to the Federal Court of Australia, seeking to have the arbitral award set aside on the grounds that the arbitral panel denied it procedural fairness, and that therefore, the arbitral award was contrary to public policy. At first instance, Justice Murphy made orders enforcing the award. TCL appealed to the Full Federal Court of Australia.

Before the Full Federal Court appeal was heard, TCL brought a constitutional challenge in the High Court. The High Court unanimously dismissed TCL's argument that the conferral of jurisdiction to the Federal Court under Art 35 of the Model Law was incompatible with Ch III of the Australian Constitution. TCL also mounted additional collateral proceedings in China during and after the arbitration despite the relevant issues having been decided in the arbitration and the Australian courts.

Ultimately, the Full Court unanimously held that there was no basis for the application to set aside the award on the ground of public policy. The court decided that the appeal on the purported breach of natural justice ground was a "disguised attack on the factual finding of the arbitrators dressed up as a complaint about natural justice". For an arbitral award to be set aside or not recognised or enforced, there must be 'real unfairness or real practical injustice' which can generally be expressed and demonstrated, with clarity and expedition. The court also stated that a wrong factual conclusion resulting from a lack of probative evidence does not necessarily, without more, amount to a breach of the rules of natural justice in the context of a commercial arbitration.

The Court commented:

> *"If the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly. That danger is acute if natural justice is reduced in its application to black-letter rules, if a mind-set appears that these rules can be "broken" in a minor and technical way … An international commercial arbitration award will not be set aside or denied recognition or enforcements… unless there is* ***demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice of procedural fairness.***

The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and expedition."

The Court concluded that the complaints of TCL related to factual evaluations and did not amount to procedural unfairness.

Comment

The decision by the court in this instance confirms Australia's position in the Asia-Pacific region as a desirable neutral seat for international arbitrators. This case demonstrates the reluctance of Australian courts to set aside arbitral awards unless there is real unfairness or factual injustice in the arbitration. The approach of the Australian Courts is typified by both a pro-enforcement approach to arbitration agreements and a restrictive approach to court intervention. This approach reflects the "*strong public policy that arbitration agreements be enforced and the finality of arbitration awards be respected*."

***Siam Steel International Plc v Compass Group (Australia) Pty Ltd* [2014] WASC 415**
Decision date - 7 November 2014

In 2012, Siam Steel International Plc ("**SSI**") entered into an agreement with Compass Group (Australia) Pty Ltd ("**Compass**") for SSI to supply accommodation buildings at Gateway Village in South Headland. The agreement stipulated that in the event of any dispute or difference arising between the parties as to any matter or thing in connection with the agreement, then a party shall give a notice of dispute. If after 28 days from the service of the notice the dispute (or such further time as agreed) cannot be resolved either party may by notice in writing to the other party, refer the dispute to arbitration. The dispute cannot be referred to arbitration unless such a notice is issued 'not later than 90 days after the service of the notice of dispute'.

A number of issues arose due to defects in the works completed by SSI. Compass wrote to SSI in December 2013 stating its intention to have recourse to the retention monies provided under the contract due to defects in the works. SSI responded by filing proceedings in the WA Supreme Court seeking a declaration that Compass was not entitled to call upon the bankers' undertaking. SSI argued that rectification had been provided with practical completion being achieved whilst Compass asserted that the defects in the works had not been remedied.

Compass applied for orders that the matter be stayed and referred to arbitration pursuant to section 8 of the *Commercial Arbitration Act 2012* (WA) (**CAA**) alternatively section 7 of the *International Arbitration Act 1974* (Cth) (**IAA**) - each of which were in materially the same terms.

Justice Le Miere was required to determine:

- Whether the IAA applied to the agreement.
- Whether the arbitration agreement was rendered inoperative by virtue of the fact that no notice of dispute had been given in accordance with cl. 48.1 of the agreement; and
- Whether the court could refer the parties to arbitration even though no valid notice of referral to arbitration had been given and no arbitrator had been appointed.

Justice Le Miere concluded that the IAA applied to the agreement. Section 7(1)(d) of the IAA was satisfied and therefore the parties could not rely on jurisdiction clauses or choice of law clauses to resist the granting of a stay order.

As to whether the arbitration agreement was inoperative, Justice Le Miere concluded that even though the parties had failed to "enliven" the arbitration agreement in cl. 48 by giving notice of the dispute, there was nothing to suggest that the agreement would be inoperative.

Justice Le Miere referred to the judgment of Gummow J in *Bakri Navigation Co Ltd v Owners of Ship "Golden Glory" Glorious Shipping SA* (1991) 217 ALR 152 in which three situations were identified where an arbitration agreement would be said to be inoperative:

- Where the English Court has ordered that the arbitration agreement shall cease to have effect, or if a foreign court has made a similar order which the English Court will recognise;
- Where an arbitration agreement becomes "inoperative" by virtue of the common law doctrines of frustration, discharge by breach, etc; and
- Where the agreement ceases to operate by reason of some further agreement between the parties.

There was nothing in the proceedings to suggest that any of these three scenarios was applicable. Therefore the arbitration agreement was operative irrespective of the failure to provide notice of the dispute.

Finally, Justice Le Miere considered whether he could validly stay proceedings and refer the parties to arbitration given no valid notice of referral to arbitration had been given to the parties and no arbitrator had been appointed. Justice Le Miere concluded that both parties had misconstrued section 7(2) of the IAA. He decided that the correct interpretation was that once the action was stayed by the court, the parties would have no other remedy than to go to arbitration, should they wish to pursue their dispute.

Comment

This case demonstrates the willingness of Australia's State Courts to enforce the terms of a valid arbitration agreement under the auspices of the IAA and CAA.

Re Ikon Group Ltd (No 2) **[2015] NSWSC 981**
Decision date - 13 May 2015

Ikon Group Ltd (Plaintiff) , Ikon Australia Pty Ltd (First Defendant), Ikon Financial Group Ltd and Multitrade Financial Group Ltd (Third Defendant) were parties to a Joint Venture Agreement that was the subject of an arbitration agreement.

The relevant arbitration agreement in cl 23.1 stated that, *"Any and all Disputes including any question regarding the existence, validity or termination of any of the JV Documents or the Third Addendum and any disputes or differences which fall to be resolved in accordance with the dispute resolution procedure set out in Clause 22 above shall be referred to and finally resolved by arbitration under the LCIA Rules"*

Clause 22.2 of the agreement stated that, *"Should any dispute or difference arise out of, in relation to or in connection with the JV Documents or any of them or the Third Addendum or the performance, validity or enforceability of any of the JV Documents or the Third Addendum (Dispute) then the Parties shall follow the procedures set out in this Clause 22"*.

Naser Taher (Second Defendant), a director of Ikon Financial Group Ltd, sought to withdraw from the agreement and recover funds deposited with the joint venture companies.

The Plaintiff filed proceedings in the Supreme Court of New South Wales seeking several declarations including, that the removal of Mr Dentrinos (a director of the First Defendant) was invalid; that the directions and appointments of Mr Yehya El-Taher and Mr Lim (Fourth and Fifth Defendants) to the First Defendant were invalid; that a payment made by the First Defendant to the Second Defendant was unauthorised and held on trust for the First Defendant; and that by authorising the payment the Fourth and Fifth Defendants were in breach of their directors duties.

The First and Second Defendants applied for an order pursuant to s 7 and/or s 16 of the *International Arbitration Act 1974* (Cth), staying the proceedings and referring the Plaintiff and the First and Second Defendants to arbitration.

The issue before the court was whether, for the purposes of s 7(2)(b), the proceedings before the court involve the determination of a matter that, in pursuance of the arbitration agreement is capable of settlement by arbitration.

Justice Brereton stayed the Plaintiff's proceedings under s 7 and referred the Plaintiff and the First and Second Defendants to arbitration. His Honour focused on the terminology of disputes or differences that "arise out of, in relation to or in connection with" the joint venture documents. He found that a dispute or difference that arises out of or is in relation to or in connection with the performance of any of the joint venture documents is defined as a 'Dispute' for the purposes of cl 23.1.

His Honour observed that "arising out of" a subject matter, in this context, is a broader notion than that of a dispute arising "under" a particular agreement or instrument.[1]

Based on these findings, His Honour held that all of the allegations of breaches of directors' duties could be seen to "arise out of or relate to" the joint venture agreements, or at least, the performance of the joint venture agreements.

[1] *Samick Lines Company Limited v Owners of the Antonis P Lemos* [1985] AC 727 (Lord Brandon).

As the Fourth and Fifth Defendants were not parties to the joint venture documents, they were not parties to any relevant arbitration agreement and the claims against them were not amenable to referral to arbitration.

Comment

Re Ikon Group Ltd (No 2) emphasises the importance of contemplating all potential parties that might be the subject of a claim. The claims against the Fourth and Fifth Defendants were not amenable to referral to arbitration as they were not parties to the joint venture agreement and so were barred by the privity of the agreement. The claim against the Fourth and Fifth Defendants would therefore be dealt with by the Court in light of the outcome of the arbitration.

***Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735**
Decision date - 12 June 2015

In this case, the Supreme Court of NSW was called on to consider the validity of an interim award issued by a NSW arbitrator in relation to a dispute arising under a construction contract.

Joss was the contractor responsible for constructing the phytotron building as part of the National Life Sciences Hubproject at Charles Sturt University in Wagga Wagga. A phytotron building is an enclosed greenhouse used for studying interactions between plants and the environment.
In June 2011 Joss subcontracted with Cube for the supply and installation of joinery and furniture. Disputes arose and in June 2012 Joss terminated Cube's contract and initiated arbitration under the IAMA Commercial Arbitration Rules. Following a contested hearing, the arbitrator made an interim award in Cube's favour.

Joss initiated proceedings seeking to have the interim award set aside on the ground that it would be contrary to public policy under section 34(2)(b)(ii) of the *Commercial Arbitration Act 2010* (NSW). Joss argued that various breaches of natural justice occurred in the making of the award including that the arbitrator acted without probative evidence or contrary to clear evidence.

The Supreme Court of NSW rejected Joss' argument finding that there was no unfairness or practical injustice in how the arbitrator approached the matter and that Joss' challenges to the arbitrator's findings were effectively a disguised attack on factual findings dressed up as a complaint about natural justice. Justice Hammerschlag stressed that a tribunal's procedure and awards should not be scrutinised with an "overcritical or pedantic eye and should be viewed with common sense and without undue legality."

In the subsequent decision of *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 829, the Supreme Court of NSW ordered Joss to pay Cube's costs of the court proceedings on an indemnity basis holding that it should have been obvious to Joss that its challenge would not meet the high threshold required for the public policy exception.

Comment

The decision follows a line of Australian decisions addressing the setting aside of arbitration awards on public policy grounds.[2] These decisions are consistent with the approach taken in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 8. The decision illustrates that the Australian public policy is to enforce arbitration awards wherever possible and to limit judicial review to the minimum level required to ensure the integrity of the arbitral process.

In so doing, Australia's judiciary has adopted a commercially sensible balance between the need to ensure necessary standards of fairness and competence in the arbitral process and the paramount objective of giving effect to the commercial intention of the parties.

[2] See *International Relief and Development v Ladu* [2014] FCA 887, *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSC 80 and Cameron Australiasia Pty Ltd v AED Oil Limited [2015] VCS 163.

Infrashore Pty Ltd v Health Administration Corporation **[2015] NSWSC 736**
Decision date - 12 June 2015

On 23 October 2008, Infrashore Pty Ltd (**Infrashore**) and Health Administration Corporation (**HAC**) entered into a written agreement, the PPP Project Deed (**Contract**).

The Contract set out a multi-tiered dispute resolution process:

- Clause 4.6(a) provided for the establishment of a committee to be known as the Project Coordination Group (**PCG**);

- Clause 4.6(h) provided that if any dispute arose between the parties, a party may by notice to all other parties refer the dispute to the PCG for resolution;

- Clause 4.6(j) provided that if a dispute is referred to the PCG it will meet to resolve the dispute, and that if it is not resolved within a specified period, either party may refer the dispute to designated Representatives in accordance with cl 40.1(a);

- If the Representatives in cl 40.1(a) do not resolve the dispute within the Resolution Period, the PCG can:

    - Refer the dispute to expert determination under cl 40.2; or

    - Refer the dispute to arbitration under cl 40.3; or

    - Refer the dispute to resolution by some other dispute resolution procedure;

- Clause 40.2(e) provided that any determination made by the expert will be binding on all parties unless referred to by arbitration or legal proceedings.

On or about 7 June 2013, Infrashore issued a *Hazardous Materials Variation Claim* (**Claim**) stating that additional work was necessary due to the presence of asbestos and that the variation gave it an entitlement to additional payments. HAC rejected this claim

On 5 December 2013, Infrashore gave a notice to the PCG, which was then referred to the Representatives. The Representatives failed to resolve the dispute and so the PCG referred it to Expert Determination under cl 40.2.

The parties subsequently entered into an Expert Determination Agreement **(EDA**) that provided 'that any determination made by the Expert will be final and binding where the dispute is not referred to arbitration under clause 40.3 of the Contract or legal proceedings within 10 days (cl. 12.4 of the EDA).

On 20 April 2015 the Expert determined that Infrashore was not entitled to any additional payment in respect of the Claim. Infrashore commenced proceedings in the NSW Supreme Court claiming damages and a declaration that the EDA was not binding on the parties.

On 30 April 2015, HAC served on Infrashore a 'Notice of Arbitration', stating that pursuant to cl 40.2(e) of the Contract it was notifying Infrashore that it was referring the determination to arbitration. HAC sought an order that the proceedings be referred to arbitration pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW).

The issue before the court was whether, pursuant to s 8(1) the action is in a matter which is the subject of an arbitration agreement. Infrashore argued that in the circumstances that have occurred and on the proper construction of the Contract, the dispute is not one which either party can require to be arbitrated. HAC argued that cl 40.2 of the Contract and cl 12.4 of the EDA are an arbitration agreement under which each party has a right to refer the dispute to arbitration.

Justice Hammerschlag agreed with Infrashore, concluding that neither the Contract nor the EDA conferred on the parties any right to require arbitration. His Honour commented that the two routes to arbitration via cl. 40 existed where the PCG referred it to arbitration or where the PCG or the Representatives requested to the President to select a process, and the President selected arbitration. In the present case, the two routes were no longer available, as the dispute had progressed past them.

His Honour also observed that the option to not be bound by the Expert Determination in cl 40.2(e) could be defeated by either party commencing legal proceedings or referring it to arbitration. If there is no further agreement as to arbitration, a party can exercise its right by commencing proceedings. He continued, that the clause made no provision for who prevails if one party chooses litigation and the other arbitration, something his Honour suggested should have been regulated by the parties

He concluded that there was no agreement for the referral of the dispute to arbitration to which s 8(1) could attach.

Comment

Infrashore Pty Ltd v Health Administration Corporation highlights the potential pitfalls of a multi-tiered dispute resolution process. The case shows that the option to arbitrate may be lost in a multi-tier process if the wording at each stage is not carefully drafted. In the present case, the route for arbitration was found to be 'no longer available' as the parties progressed through each tier, emphasising that if the parties wished arbitration to be available at each tier, they should have drafted the clauses accordingly.

Aircraft Support Industries Pty Ltd v William Hare UAE LLC **[2015] NSWCA 229**
Decision date - 11 August 2015

In 2009, Aircraft Support Industries Pty Ltd (**ASI**) entered into a subcontract with William Hare UAE LLC (**Hare**) for Hare to perform construction work at Abu Dhabi Airport. The subcontract included an arbitration agreement by which subcontract disputes were to be arbitrated under the auspices of the Abu Dhabi Chamber of Commerce. A dispute arose as to the final amount due and payment of retention monies. An arbitral tribunal in Abu Dhabi after the completion of a contested hearing issued a final award providing that ASI pay Hare the retention monies plus an additional amount of USD$50,000.

Hare initiated proceedings in the NSW Supreme Court to enforce the arbitral award.

ASI resisted the enforcement on the basis that it would be contrary to public policy under section 8(7)(b) of the *International Arbitration Act 1974 (Cth)* as a breach of natural justice occurred in connection with making the award.

ASI argued that it was a breach of natural justice for the tribunal to award Hare $50,000 as part of the final arbitral award in circumstances where Hare had initially claimed the amount but then failed to claim it in its Statement of Claim or address it in its submissions. ASI argued that if the tribunal was considering ordering the payment of $50,000, it should have notified ASI and invited the parties to address the claim.

The Supreme Court of NSW agreed ordering that the $50,000 be severed from the arbitral award on the basis that the claim for $50,000 ought reasonably to have been treated by all concerned as no longer pressed and that the tribunal had acted unfairly. The Court ordered that the remaining part of the arbitral award be enforced.

ASI appealed on two grounds. Firstly, ASI argued that the remaining part of the arbitral award should not be enforced as there had also been a breach of natural justice in relation to that part of the award. Secondly, ASI argued that it was not possible to sever the $50,000 claim with the consequence that no part of the arbitral award should be enforced because of the denial of natural justice in respect of the $50,000 claim.

The NSW Court of Appeal dismissed the appeal on the basis that the Court had the power to partially enforce the award where no injustice flowed as a result. In addition, the Court of Appeal found that there was no denial of natural justice. The Court of Appeal held that in order for a court to decline to enforce an award it is necessary to show that a breach of natural justice caused 'real practical unfairness and real practical injustice to the party resisting enforcement' - [42] and [43]. ASI had failed to demonstrate practical unfairness or injustice. It was not enough to simply point to a matter that the tribunal appeared not to address. Indeed, ASI's approach to the issue allegedly not addressed by the tribunal, suggested that ASI had not sought to have it addressed in its closing submissions.

Comment

This decision demonstrates the pro-arbitration attitude of the Australian judiciary. While the Court of Appeal was not required to consider the Supreme Court's decision not to enforce the claim for $50,000 on the basis of a breach of natural justice, the Court of Appeal confirmed the high bar which must be met in order to challenge a commercial arbitral award as contrary to public policy.