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Recent News and Events

Editorial:

Contributed by David L Bailey, Fellow AICA.

Victoria University launches arbitration course

The inaugural course in Commercial Arbitration Law was taught at Victoria University last summer from 14 January to 21 January 2013 as an intensive course. Thirty seven candidates took the course. The course covered the principles of arbitration law together with an analysis of the uniform State and Territory commercial arbitration legislation. Key features of the domestic arbitration regime were examined in comparison with the UNCITRAL Model Law upon which the uniform domestic legislation was drawn. There was an introduction to international commercial arbitration. The course concluded with a review of current issues in arbitration including the scope of public policy, the operation of the confidentiality provisions under State and Commonwealth arbitration legislation, and, the constitutional challenges to both the International Arbitration Act (Cth) and the NSW Commercial Arbitration Act.

The consensus was that the course was well received. The remaining subjects in the course are Commercial Arbitration practice and procedure; Award writing and drafting; and, International Commercial Arbitration.

The subject Commercial Arbitration Practice and Procedure will be offered in the winter course program in the first week of July 2013. Richard J Manly, of the Victorian Bar and a councillor of AICA is the subject director for the subject.

The constitutional challenge

By now the judgment of the High Court handed down on 13 March 2013 rejecting the constitutional challenge to provisions in the International Arbitration Act 1974 (Cth) has been the subject of much attention in the media and in some professional writings. The outcome, whilst not unexpected, is a welcome sign for the future of international commercial arbitration in Australia. The decision is reviewed in this Bulletin.

Not so encouraging for the arbitration of investor/State investment disputes involving Australia is the change in the policy of the Australian Government towards the inclusion of submission to arbitration in bilateral investment treaties. This topic is dealt with comprehensively by Associate Professor Jürgen Kurtz of the Law School, University of Melbourne in his article in the ICSID Review referred to below.

INTERNATIONAL NOTES

International News

USA – Enforcement Proceedings Defence

An arbitral award issued by a Tribunal constituted under the London Maritime Arbitration Association was refused enforcement by a court in the USA[1] in apparent conflict with the obligations to enforce foreign arbitral awards under the 1958 United Nations Convention on Recognition and Enforcement

[1] First Inv Corp of marshall Islands v Fujuin Mawei Shipbuilding Ltd 12-30377, 2013 BL (5th Circuit Jan 17 2013) (Bloomberg Law)

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of Foreign Arbitral Awards (The New York Convention) of which the USA is a signatory.

The award for approximately USD26 million was made against two entities from the People's Republic of China and in favour of the claimant (First Investment).

Enforcement was denied on the grounds that the court did not have personal jurisdiction over the PRC parties.

Initially First Investment sought to have the award enforced in the Xiamen Maritime Court in Fujian Province where the shipbuilder respondent was domiciled.

The Xiamen court refused to enforce the award as it had not been signed by the PRC appointed party arbitrator (who had been arrested in the PRC on corruption charges before having an opportunity of perusing and signing the award).

When enforcement proceedings were brought in Louisiana, First Investment named the PRC as a defendant as well as the two Fujian entities, arguing that the Fujian entities were "alter egos" of the PRC.

The PRC moved to dismiss the proceedings on grounds of Sovereign Immunity.

Article V of The New York Convention does not provide for personal jurisdiction defences, but the US Constitution requires that a court must have personal jurisdiction over the parties before it.

The Louisiana court refused enforcement on grounds of lack of personal jurisdiction over the PRC.

India – Questions of Law

The Delhi High Court, in a recent judgement[2], affirmed the long standing common law principle that where parties have agreed to refer to arbitration a question of law, the arbitral decision cannot be interfered with even if the court itself might have come to a different opinion on the law from that of the arbitrator.

The matter referred to arbitration was the interpretation of a tripartite agreement made between the Indian Government, the Housing and Urban Development Corporation Ltd and Ansal Properties in respect of development of land.

The dispute between the parties related to the ground rent and interest to be paid pursuant to the agreement.

The arbitrator found in favour of the climant Ansal Properties.

On appeal to the Delhi High Court by the respondents a single judge disagreed with the arbitrator's award and set it aside.

The Claimant, Ansal Properties, then appealed to a division bench of the High Court which overturned the single judge's decision and distinguished between a general reference of dispute to arbitration and reference of a pure question of law to arbitration as in this case.

France – Stay of Execution

In 2011 Decree 2011-48 was introduced reforming French law on arbitration.

Particularly this Decree amended the position in France in relation to stay of enforcement of international arbitral awards.

Under the provisions of the previously in force Article 1526 of the Code of Civil Procedure a common practise of award debtors was to bring an action to set aside the award or to appeal against an Order granting exequatur. This automatically stayed the execution of the award.

Article 1526(2) now provides discretionary powers in a court where automatic execution would seriously prejudice one of the party's rights (not necessarily on the award debtor).

A "balance of harm" test requiring establishing that compliance with the award would cause material and irreparable harm to one party where no comparable harm would be suffered by the other party if execution was stayed appears to be the principle applied by the courts

[2] Ansal Properties and Infrastructure Ltd v Housing and Urban Development Corporation Ltd FAO(08) 309/2012

since introduction of Decree 2011-48 two years ago.

In three relevant cases recently decided since amendment of the law applications for stay of execution were denied on grounds of the "balance of harm" principle.

AA de FINA

Singapore International Arbitration Centre

The SIAC has adopted a new governance structure and revised rules of arbitration with effect from 1 April 2013. The new structure includes the establishment of a Court of Arbitration overseeing the case administration and arbitral appointment functions of the SIAC. The corporate and business development functions of the SIAC will remain overseen by the Board of Directors. Details of these changes can be viewed on the SIAC website – www.siac.org.sg/

Treaty scoreboards

- **New York Convention – as at 8 April 2013 there are 148 parties to this convention;**
- **ICSID Convention – as at 8 April 2013 there were 158 signatories and 147 ratifications of this convention;**
- **UNCITRAL Model Law legislation – as at 8 April 2013 93 jurisdictions had enacted Model Law legislation.**

Legislation update:

Queensland has now enacted the Commercial Arbitration Act 2013 and joins the other States and the Northern Territory in enacting the uniform domestic legislation based on the UNCITRAL Model Law. The legislation was passed on 14 March 2013.

The State and Territory domestic commercial arbitration now enacted is as follows:

NSW: Commercial Arbitration Act 2010;

NT: Commercial Arbitration (National Uniform Legislation) Act 2011;

QLD: Commercial Arbitration Act 2013;

SA: Commercial Arbitration Act 2011;

TAS: Commercial Arbitration Act 2011;

VIC: Commercial Arbitration Act 2011;

WA: Commercial Arbitration Act 2012.

Tobacco – plain packaging dispute

1. In ***JT International SA v Commonwealth of Australia*** (2012) HCA 43 and was published on 5 October 2012a majority of the High Court of Australia rejected a constitutional challenge mounted by several tobacco companies who opposed the passing of the **Tobacco Plain Packaging Act 2011** on the grounds that it amounted to an acquisition of their statutory intellectual property on unjust terms in breach of Section 51(xxxi) of the Constitution.

2. On 15 May 2012 a three member international arbitration panel was established to hear an investor/state arbitration claim brought by Philip Morris Asia Ltd against The Commonwealth of Australia.

3. In 1993 the Australia and Hong Kong governments entered into a bilateral investment treaty entitled *"Agreement between the Government of Australia and the Government of Hong Kong for the promotion and protection of investments."*

4. Article 10 of the Treaty provides that any disputes between an investor of one contracting party and the other contracting party, which has not been settled amicably, shall after a period of three months from written notification of the claim be submitted to arbitration under the

Arbitration Rules of UNCITRAL.

5. On 27 June 2011 Philip Morris Asia gave notice of a claim against The Commonwealth of Australia. The claim was not capable of amicable settlement.

6. On 21 November 2011 PM Asia served a Notice of Arbitration pursuant to Article 10 of the Treaty and Article 3 of the UNCITRAL Arbitration Rules on The Commonwealth of Australia.

7. The relief claimed in the Notice was for compensatory damages to be quantified, but of the order of billions of Australian dollars.

8. Australia's Response to the Notice of Arbitration filed on 21 December 2011 raised a number of preliminary jurisdictional issues.

9. The arbitral tribunal has conducted a number of procedural directions hearings. To date, seven procedural notices have been published by the Tribunal. Notices can be located on the website of the Permanent Court of Arbitration in The Hague at http://www.pca-cpa.org/showpage.asp?pag_id=1494.

10. The Commonwealth of Australia wants the issue of the Tribunal's jurisdiction to hear the matter separated from arguments from the merits of the case.

11. Procedural Notice No. 7 directs that a substantial hearing on this will not take place on 20 February 2014.

Richard J Manly S.C., Fellow AICA

Case notes:

Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2) [2012] FCA 1214

Challenge to enforcement of Model Law award on basis award made contrary to public policy:

The decision in the above case was handed down by Justice Murphy a few days before the High Court heard the constitutional challenge brought by TCL in a separate application in the original jurisdiction of the High Court.

The above proceeding involved an application by Castel as the award creditor under two Model Law arbitral awards against TCL seeking to enforce those awards in the Federal Court. The application was brought under the IAA. An unusual feature of the case was that the awards, although made in an international arbitration, were made in Australia, the arbitration having also been conducted in Australia. They were therefore not 'foreign awards' for the purpose of the IAA.

TCL, the award debtor, made a cross application to set the awards aside. TCL relied on a number of grounds. It may be recalled that TCL challenged the jurisdiction of the Federal Court to enforce the awards. In an earlier decision reported at [2012] FCA 212, Murphy J held that the Federal had jurisdiction. That decision is noted in the AICA Bulletin No 1.

The substantive ground relied upon by TCL was that in making the final award other than on costs the arbitral tribunal had engaged in a denial of natural justice and thereby the award was made contrary to public policy.

Two aspects of natural justice were relied upon. It was alleged by TCL that there were breaches of the 'no evidence rule' and of the 'hearing rule' by the arbitral tribunal. The no evidence rule would apply if there was no rationally probative evidence in support of the relevant findings of the tribunal. The hearing rule requires that the tribunal afford the parties a fair hearing, in particular, whether the Tribunal reached findings which were not reasonable corollaries of the opinions and ideas traversed during the hearing.

His Honour considered that public policy, as applied in the IAA, included both procedural questions as well as substantive law questions. He also observed that the public policy to be applied depended upon whether the ground was used to set aside an award in the place where it was made or the place where it was to be enforced. In this case both these were the same.

The degree of seriousness of the breach of the rules of

natural justice was considered by Murphy J. He was concerned with the need for consistency with international decisions on the meaning of public policy. However, given the express wording of s 19(b) of the IAA importing breaches of natural justice into the meaning of public policy under the IAA His Honour concluded that the clear meaning of s 19(b) was that any breach of the rules of natural justice in connection with the making of an award could mean that the award was contrary to public policy (at [29] to [31]). But, in applying s 19(b) it was clear that arts 34 and 36 of the Model Law conferred a discretion on the court charged with an application to set aside or refuse enforcement of an award.

TCL contended that the extent of the review needed in relation to setting aside an award required the court to "examine the facts of the case afresh and revisit in full the questions that were before the tribunal", (at {53]). Murphy J rejected such an approach as contrary to the pro-enforcement bias of the Convention and s 39(2) of the IAA. The level of review required was such as necessary to determine the two grounds of natural justice relied upon by TCL.

In view of the nature of the facts and circumstances of the case His Honour decided that it was necessary to undertake a close review of the evidence in the case in order to decide the application.

The key issue was the tribunal's finding of the extent of loss and damage suffered by Castel as the result of TCL selling competing products in the Australian market. TCL's expert evidence was that the effect was limited to a 7% share of the market. Castel led evidence that it was 100% of the relevant market. In cross examination TCL's expert accepted that if the product market was doubled due to the characterisation of the relevant products the market share would be 14% rather than 7%. The tribunal decided that the market share affected was 22.5%.

The tribunal was faced with a case where no precise calculation of the extent of loss and damage was possible. It was clear that Castel had suffered some loss and damage, and, the tribunal had the task of assessing the extent of such loss and damage. His Honour found that the broad estimate made by the tribunal did not offend the no evidence rule. The tribunal gave a detailed analysis as to how it had reached its estimate and why it rejected the parties estimates. The evidence was carefully weighed by the tribunal.

His Honour found that there was no basis for the application of the no evidence rule. With respect to the alleged breach of the hearing rule His Honour reviewed decisions with respect to the application of the rule to arbitration hearings. He held that such rule did not extend to a requirement that the tribunal must give notice of its provisional thinking to the parties. The application of the rule depends upon the facts and circumstances of the case. TCL would have had to show that no reasonable litigant in the position of TCL would have foreseen the possibility of reasoning of the type that led to the 14% starting point finding. It was difficult for TCL to do so given that evidence capable of supporting the findings was traversed in the hearing.

As noted above, an unusual feature of the case was that the award was made in Australia and sought to be enforced in Australia. Therefore, it was not a foreign award. No procedure for the enforcement of such an award was set out in the Federal Court Rules 2011.

His Honour noted that art 35 of the Model Law, which is given the force of law by s 16 of the IAA, provides that a competent court may recognise an award as binding and enforce it upon application in writing. There was no express requirement or procedure in the IAA for recognition of awards. The legislation had a pro-enforcement bias. In His Honour's view an award would be "recognised" once an order for enforcement were made (at [182] to [184]. An order was made in terms of the awards for enforcement. For the terms of the judgment see *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 3)* [2012] FCA 1282.

***TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor* [2013] HCA 5.**

Validity of art 35 Model Law; compatibility with Ch III of the Constitution; whether enforcement of arbitral award confers judicial power on arbitral tribunal.

The much awaited decision of the High Court in the above case was handed down on 13 March 2013. The result has been regarded as most beneficial to the future of Australia as a venue for the conduct of international commercial arbitration. Numerous articles have appeared in journals and websites of major law firms heralding the decision.

TCL applied in the original jurisdiction of the High Court during the course of the Federal Court case before Murphy J (see above) seeking to prevent the judges of the Federal Court from enforcing the arbitral awards as contrary to the Constitution. There were two grounds for the application. First, it was put that to enforce the award of a private arbitral tribunal in effect conferred judicial power on the tribunal by having the Federal Court "rubber stamp" the award thereby converting the award into an exercise of judicial power. The second basis was that the grounds for refusal of the enforcement of awards under the Model Law excluded review of awards for error on the face of the award and this was an impermissible interference with the judicial power.

The second defendant to the application was Castel Electronics Pty Ltd and the Attorneys-General for the Commonwealth, Queensland, South Australia, Victoria, Western Australia and New South Wales intervened. As well ACICA, IAMA and the Chartered Institute of Arbitrators made written submissions as amici curiae. The written submissions of the parties, interveners and amici curiae are available on the High Court website.

Both judgments of the members of the Court (French CJ and Gageler J; and, Hayne, Crennan, Kiefel and Bell JJ) rejected TCL's contentions and upheld the validity of the relevant IAA and Model Law provisions.

Apart from the constitutional questions raised by the application the jurisdiction of the Federal Court to deal with applications under art 35 of the Model Law was confirmed, see per French CJ and Gageler J at [2]. An application to enforce a Model Law is a "matter" arising under a law made by the Commonwealth. The Federal Court has original jurisdiction in a matter arising under a law of the Commonwealth by reason of s 39 B(1A)(c) of the Judiciary Act. It follows that the Federal Court is a competent court for the purposes of the Model Law.

TCL contended that the legislation interfered with the institutional integrity of the Federal Court by removing from the court the power to review an award for the correctness of the application of the applicable rules of law by the arbitral tribunal. French CJ and Gageler J held that the inability of the Court to refuse to enforce an award on the ground of error of law on the face of the record under the Model Law did not undermine the institutional integrity of the court. By enforcing the award the court was not endorsing its legal content or its factual content. The alleged common law basis of a general jurisdiction of courts to set aside an arbitral award for error of law was not of general application, operated haphazardly, depending upon whether the arbitrator had delivered a reasoned award. It formed no part of and bore no resemblance of the supervisory jurisdiction of a Supreme Court of a State to set aside an exercise of judicial power for jurisdictional error.

Hayne, Crennan, Kiefel and Bell JJ held to similar effect noting that there was no distorting of the functions of a court due to the absence of scope for judicial review based upon error on the face of the award. TCL had failed in its submission to take account of the consensual foundation of private arbitration and in turn of the relationship between private arbitration and the courts.

Was the effect of enforcing arbitral awards under the IAA and the Model Law a conferment of judicial power contrary to Ch III of the Constitution?

French CJ and Gageler J distinguished the making of an arbitral award by an arbitrator appointed by the private agreement of the parties from the exercise of judicial power. The exercise of the authority by the arbitrator to make an award is founded

on the agreement of the parties and lacks the essential foundation for the exercise of judicial power. Judicial power is exercised without the consent of the parties. Hayne, Crennan, Kiefel and Bell JJ referred to the way that an arbitral award operates and to the earlier decision in *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652-653 as explaining the process. The effect of an award is to extinguish the former rights of the parties under their contract and to replace them with new rights constituted by the award. The award operates as an accord and satisfaction. When the rights created by an award are enforced by curial process the obligations sought to be enforced are the rights created by the award in substitution for the rights and liabilities which were the subject of the dispute.

The consensual nature of arbitration underpins the general rule that an award is final and conclusive and cannot be challenged either at law or in equity on the ground that an arbitrator has committed an error of fact or of law. The curial supervision of awards depended on matters of chance and caprice such as the terms of reference, and whether the award contained reasons. The courts never asserted any general jurisdiction to review arbitral awards.

An award can be enforced either pursuant to the powers conferred on the courts under legislation such as the IAA and the CAA. An award may also be sued upon as a cause of action. The fact that an award can be sued upon as a separate cause of action serves to highlight that it gives rise to new rights.

The decision is a most useful analysis of the nature of private arbitration, its relationship to the enforcement of awards by the courts and the juristic basis of the IAA and the Model Law.

Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd [2012] NSWSC 1306.

Validity of the Commercial Arbitration Act 2010 (NSW).

In this case the plaintiff sought a declaration that ss 5, 35, 35 and 36 of the CAA were beyond the legislative power of New South Wales. The basis of the challenge was remarkably similar to that in the TCL High Court case. The plaintiff relied upon two reasons. First, that the aforesaid sections were an impermissible attempt to remove from the Court its constitutionally entrenched jurisdiction to review arbitral awards for "jurisdiction error" and, secondly, that ss 35 and 36 requiring the Court to enforce arbitral awards except in limited circumstances together with ss 5 and 34 impermissibly impair the "institutional integrity" of the Court by requiring the Court to enforce an arbitral tribunal (sic) infected by jurisdictional error.

Stevenson J refused to make the declarations sought by the plaintiff. His Honour noted the nature of private arbitrations under the CAA. There was no analogy with cases such as *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531. This was because an arbitrator when making an award, in the case of voluntary submission to arbitration, was not exercising public authority. *Kirk's case* was concerned with the exercise of State executive and judicial power. His Honour also noted that prerogative writs do not issue in respect of the decisions of private arbitrators.

Further on His Honour's analysis of the jurisdiction of courts to review arbitral awards for error he found that the history of such review was not suggestive of an entrenched inherent jurisdiction.

There was no interference with the institutional integrity of the Court. The Court was not being used as a mere agency of the executive c/f *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51. The Court's function was not being usurped or directed by the executive. The Court retained an adjudicative role in determining whether to enforce an arbitral award or not. This is similar to the role a court plays when enforcing a foreign judgment. It has no adjudicative role in relation to the foreign judgment. Its role is limited to whether to enforce the foreign judgment.

BASF Coatings Aust Pty Ltd v Akzo Nobel Pty Ltd [2013] VSC 31

Application for leave to appeal arbitrator's decision;

whether or not manifest error on face of award

This is a decision under s 38 of the Commercial Arbitration Act 1984 (Vic). There was common ground between the parties as to the relevant test for "manifest error" as applied in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37; 244 CLR 239 at [42].

The arbitration concerned the manufacture and testing of primer. BASF claimed that the primer had been defectively manufactured. The arbitrators found that Akzo was not liable.

BASF sought leave to appeal from the award on the basis that the arbitrators had not properly determined breaches of testing requirements by Akzo. In each case the Court reviewed the arbitrators findings against the relevant evidence as to testing. The Court did not find that any alleged ground of appeal that was pressed was made out. Leave to appeal was not granted.

***Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253**

Scope of arbitration clause; application for preliminary discovery – whether urgent interlocutory relief; whether stay should be granted under s 8 Commercial Arbitration Act 2011, Vic.

Amcor and Baulderstone entered into a project delivery proposal agreement (PDPA) in relation to construction of a new building to house a large paper machine for Amcor in November 2008. Prior to the execution of the PDPA Baulderstone representatives suggested that the most appropriate form of contract for the works would be a Guaranteed Maximum Price contract (GMP). In March and April 2010 drafts of a GMP were exchanged by the parties. In May 2010 the PDPA was amended to take account of the intention of the parties to enter into a GMP for Stage 2 of the works.

Negotiations in respect of the form of the GMP continued during 2010. Ultimately Baulderstone's holding company, Bilfinger, withdrew approval for Baulderstone to be involved in the works if governed by a GMP contract. The matter remained unresolved and Amcor entered into an alternative construction contract with another party.

Amcor commenced an application for preliminary discovery against Baulderstone and its individual representatives who were said to have represented that Baulderstone had the relevant approval to enter into a GMP contract. Amcor sought preliminary discovery to confirm its belief that it may have a right to issue a proceeding against Baulderstone, its representatives and Bilfinger.

Baulderstone opposed the application on the basis that the Court was required to stay the application for preliminary discovery under s 8 of the Commercial Arbitration Act 2011 (Vic). It pointed to cl 31 of the PDPA which provided that a party must not start court proceedings (excepting interlocutory relief) unless it had complied with cl 31. Cl 31 provided for a dispute resolution procedure including ultimately arbitration. Dispute was defined as a dispute arising out of or in connection with the agreement.

Marshall J considered that the words "in connection with" had been given a wide and generous interpretation in the cases.

Amcor contended that the relief it might obtain against Baulderstone could include the following:

- Relief pursuant to s 52 of the Trade Practices Act 1974 which applied at the relevant times;
- Against the proposed individual respondents;
- Against Baulderstone for breach of contract terms dealing with good faith;
- Against Baulderstone for equitable compensation by reason of Amcor's reliance upon matters, assumptions and representations held out by Baulderstone.

Amcor maintained that such matters did not arise "out of or in connection with the PDPA rather the dispute concerned a proposed GMP contract that never eventuated.

Marshall J accepted Baulderstone's submission that the PDPA extended its reach to each of the proposed causes of action foreshadowed by Amcor. The

application for preliminary discovery concerned those claims, and, it followed that the application for preliminary discovery fell within the scope of a dispute arising out of or in connection with the PDPA.

Amcor contended that the application for preliminary discovery fell under the exception in cl 31 dealing with applications for urgent interlocutory relief. Marshall J accepted that there could be situations where the exception would apply such as where the preservation of the subject matter of the dispute was necessary. But such was not the case here. An application for preliminary discovery did not, from a policy perspective, require urgent intervention from a court, and, might be more appropriately addressed during the course of the arbitration.

Amcor also submitted that the fact that there were proposed personal parties who were not parties to the PDPA required that the application ought not be stayed. Baulderstone submitted that the Court could in the exercise of its discretion and having regard to s 23 of the Federal Court of Australia Act 1976 order a stay of the application as regards the individual respondents.

Marshall J acceded to Baulderstone's submissions and ordered a stay in respect of the proposed proceeding against Baulderstone pursuant to s 8 of the CAA; and, in respect of the proposed proceeding against the individual respondents pursuant to s 23 of the Fed Court of Australia Act.

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd [2013] WASCA 66

International commercial arbitration; application for interim relief refused; scope of disputes to be arbitrated; what measures can be ordered by way of interim relief pending arbitration

This dispute concerned an agreement for the sale of mining tenements in three tranches. The dispute resolution clause in the agreement provided for a staged process, the last stage of which was arbitration. Under an associated guarantee MCC agreed to guarantee the payment of the last tranche under the sale agreement. The guarantee also contained a dispute resolution clause providing a staged process, the last stage of which was arbitration.

Disputes occurred and the Cape Lambert parties commenced proceedings in the Supreme Court of Western Australia. The dispute procedures under the sale agreement and guarantee agreement were also activated. MCC sought a stay of the proceeding on the grounds that both agreements contained arbitration agreements under both the State commercial arbitration legislation and the IAA.

The primary judge held that the proceedings should be stayed. He also decided that MCC should be ordered to pay funds into escrow on an interim basis pending the outcome of a mediation under the dispute resolution procedure. He also proposed that the interim order would be reviewed by any arbitrator appointed under the dispute resolution procedure.

Martin CJ considered that the interim order with respect to paying funds into escrow had difficulty. First, how an arbitrator could modify a court order was not clear especially given the need to determine which law would govern the arbitration. Secondly, an arbitrator charged with dealing with an international dispute might have difficulty dealing with an application to set aside the order of a court in another jurisdiction. Thirdly, arbitrators do not exercise judicial power, and, thus powers conferred upon a court could not be conferred upon an arbitrator.

His Honour considered the scope of the arbitration clauses in the agreements. He noted that the weight of decisions in Australia establishes that courts will generally take a broad , liberal and flexible approach to the construction of arbitration agreements, having regard to the ordinary meaning of words in dispute.

Given such approach His Honour held that the language of the dispute clause in the guarantee was sufficiently wide to mean that any dispute as to the escrow provision would be referred to mediation or arbitration under the stage dispute resolution process.

It was necessary to decide whether an order for the payment of funds into escrow could be regarded as within the court's jurisdiction to provide interim orders pending resolution of the dispute by arbitration. His Honour held it was not. The orders contemplated by the IAA under s 7(3) are such as necessary to preserve rights in relation to property subject to the dispute until the dispute can be determined. That is that such interim orders are necessary to augment or facilitate the reference of the dispute to arbitration by preserving the rights until the arbitral tribunal is properly seized of the dispute. The orders in question did not have such characteristics. Further the arbitrator would have power to make orders with respect to payment of funds into escrow in exercise of his jurisdiction.

It was alternatively contended that the court could impose conditions upon the grant of a stay and make an order for a payment into escrow on such basis. Martin CJ noted that the conditions contemplated by s 7(2) were only to be incidental or supplemental to the agreement to arbitrate. That agreement ought not be frustrated or distorted by the imposition of conditions not within the agreement. His Honour referred with approval to the dictum of Kirby P (as he was) in *O'Brien v Tanning Research Laboratories Inc* (1988) 14 NSWLR 601 at 622. Such approach was also in line with international authorities such as *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 per Lord Mustill at pp 367-368 and authorities in Hong Kong and New Zealand. Accordingly, no condition should be imposed in this case.

Articles and books of interest

Kurtz: *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication,* (2012) 27 ICSID Review, 65-86. This is a must read for all those interested in investor/State investment protection and the implications of the Australian policy shift.

Garnett: *Jurisdiction clauses since Akai,* (2013) 87 ALJ 134. This is a useful review of the case law concerning jurisdiction clauses in contracts, their interpretation and enforcement. The author is Professor of Private International Law at the University of Melbourne.

Justice Foster: *International Arbitration: An Australian Perspective*; (2012) 31 The Arbitrator and Mediator, 1. This is a paper that was delivered at the annual conference of the Institute of Arbitrators and Mediators National Annual Conference in 2012. His Honour is the arbitration co-ordinating judge in the Sydney Registry of the Federal Court of Australia.

Idornigie: *Investor/State Arbitration: Challenges Facing Capital Importing Countrie* (2012) 31 The Arbitrator and Mediator 49. The author is Research Professor and Head Commercial Law, Nigerian Institute of Advanced Legal Studies, Abuja. This article examines the challenges faced by capital importing countries in arbitrating under the ICSID regime.

Maurer: *The Public Policy Exception under the New York Convention: History, Interpretation and Application:* Juris Publications 2012. This is a comprehensive survey of the public policy ground. In light of the recent decision of Murphy J in ***Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)*** **[2012] FCA 1214** it may be of interest.

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