DLA PIPER

JULY 2015

ARBITRATION UPDATE

AUSTRALIAN COURT FOLLOWS INTERNATIONAL BEST PRACTICE IN ENFORCING COMMERCIAL ARBITRATION AWARD

Australian courts have now overwhelmingly adopted a pro-enforcement approach to commercial arbitral awards, both international and domestic. Two recent decisions of the Supreme Court of New South Wales in *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735 (*Cube Furniture No. 1*, available here) and *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 829 (*Cube Furniture No. 2*, available here) illustrate the Australian judiciary's commitment to follow international best practice when interpreting the public policy ground for setting aside or refusing to recognise commercial arbitration awards.

On 27 May 2015, in *Cube Furniture No. 1*, the Supreme Court of New South Wales (NSW) refused to set aside a domestic arbitration award on public policy grounds under section 34(2)(b)(ii) of the *Commercial Arbitration Act 2010* (NSW) (CAA). The decision confirms that the restrictive, pro-enforcement approach to the public policy exception set out by the Full Court of the Federal Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 (TCL Air Conditioner) will be uniformly applied by Australian courts to both international and domestic commercial arbitration awards.

On 26 June 2015, in *Cube Furniture No. 2*, the Court made an indemnity costs award against the party who unsuccessfully challenged the arbitration award. This second decision further confirms the willingness of Australian courts to follow international best practice by awarding indemnity costs against a party who unsuccessfully challenges an arbitration award on public policy grounds.

Although both decisions concern the domestic arbitration act of NSW, the CAA, the approach taken by the Court is in line with section 2A of the CAA, which calls for practicable uniformity between application of the CAA to domestic arbitrations and application of the Model Law to international arbitrations. Notably, section 34(2)(b)(ii) of the CAA mirrors Article 34(2)(b)(ii) of the Model Law, as implemented in Australia by sections 8(7)(b) and 19

of the *International Arbitration Act 1974* (Cth) (IAA).

The decisions illustrate the Australian judiciary's commitment to follow international best practice when considering applications to set aside or resist enforcement of commercial arbitration awards (whether international or domestic) for breaches of natural justice.

BACKGROUND OF THE DISPUTE

Colin Joss & Co Pty Ltd (Joss) and Cube Furniture Pty Ltd (Cube) were party to a construction subcontract which provided for the resolution of disputes by arbitration seated in New South Wales under rules 5-18 of the Arbitration Rules of the Institute of Arbitrators and Mediators Australia.

Joss terminated the subcontract and initiated arbitration, claiming liquidated damages for delays in completion of stages 2 and 3 of the project and for negative variations to the subcontract sum. Cube counterclaimed for unpaid amounts due under the subcontract.

In an interim award issued on 4 November 2014, the arbitrator ordered Joss to pay Cube the balance of the subcontract sum, adjusted to reflect Cube's liability for delays and for negative variations: $149,773.78. A final award issued on 12 January 2015 ordered Joss to pay Cube's costs of the arbitration.

Joss initiated proceedings in the Supreme Court of NSW 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 CAA. 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 and that the arbitrator breached the "hearing rule."

His Honour, Justice Hammerschlag, rejected Joss's arguments, finding that:

- the arbitrator's findings were clearly based on evidence before the tribunal, and in any event, *"viewed in a common sense way and without undue legality, these findings are open to be viewed as ones of fact…There was no, let alone real, unfairness or practical injustice in how the Arbitrator approached the matter."*; and
- Joss's challenges to the arbitrator's findings were effectively a *"a disguised attack on factual findings dressed up as a complaint about natural justice"*, and therefore failed.

In *Cube Furniture No. 2*, His Honour criticised Joss's conduct in challenging the arbitrator's award, finding that it should have been *"obvious to Joss that its challenge would not meet the threshold required* [for the public policy exception] *and that it had no realistic prospect of success."* His Honour went on to state that *"*[o]*n no fair view could what the Arbitrator did have been characterised as being contrary to the public policy of* [NSW]. *Added to this, Joss abandoned a number of manifestly insupportable contentions."* His Honour therefore ordered Joss to pay Cube's costs of the court proceedings on an indemnity basis.

IMPLICATIONS OF THE DECISION

His Honour's reasons clearly illustrate that Australian courts will not involve themselves in a review of the merits of an award merely because a dissatisfied party invokes the rules of natural justice.

The decision in *Cube Furniture No. 1* confirms that the Supreme Courts of Australia have discretion to set aside an award that is infected with a *"sufficiently material"* breach of the rules of natural justice. However, in order to exercise this discretion, a plaintiff must be able to demonstrate *"real unfairness or real practical injustice in how the arbitration was conducted or resolved by reference to established principles of natural justice or procedural fairness."*

In refusing to set aside the award, His Honour relied on the approach to the public policy exception set out in *TCL Air Conditioner*, holding that:

1. "*a disguised attack on factual findings dressed up as a complaint about natural justice will not suffice"* for an application to set aside under section 34(2)(b)(ii) of the CAA; and
2. a factual finding by an arbitral tribunal without probative evidence may result in a sufficiently material breach of the rules of natural justice if "*the fact was critical, was never the subject of attention by the parties to the dispute and where the making of the finding occurred without the parties having an opportunity to deal with it. It does not follow, however, that any wrong factual conclusion that may be seen to lack*

*probative evidence (and so amount to legal error) should necessarily, **and without more**, be characterized as a breach of the rules of natural justice*" in the context of an application to set aside an award.

In *Cube Furniture No. 2*, His Honour expressly noted that the *"public policy exception corresponds to the public policy in favour of making arbitral awards, both domestic and international, binding.*" His Honour went on to observe that the *"high threshold that the public policy exception demands brings with it the enhanced risk of an indemnity costs award because a failed challenge will be more easily identified as one which should not have been brought because it was throughout destined to fail."*

The decisions in *Cube Furniture No. 1* and *Cube Furniture No. 2* follow a line of recent Australian decisions addressing the setting aside of arbitration awards on public policy grounds, including *Uganda Telecom Ltd v High-Tech Telecom Pty Ltd* [2011] FCA 131, *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276, *International Relief and Development v Ladu* [2014] FCA 887, *Sauber Motorsport AG v Giedo Van Der Garde BV* [2015] VSC 80 (affirmed on appeal in *Sauber Motorsport AG v Giedo van der Garde BV & Anor* [2015] VSCA 37) and *Cameron Australasia Pty Ltd v AED Oil Limited* [2015] VSC 163.

With the sole exception of the decision of the Supreme Court of NSW in *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 (William Hare), discussed in our previous article, these decisions are consistent with the approach taken in *TCL Air Conditioner*. They illustrate 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.

Importantly, the reasoning in these decisions supports the power of arbitral tribunals to conduct proceedings in the manner that they deem appropriate and demonstrates the reluctance of the judiciary to engage in overly critical review of arbitral procedure. In *Cube Furniture No. 1*, His Honour stressed that a tribunal's procedure and awards should not be scrutinised with an *"overcritical or pedantic eye and should be viewed with commonsense and without undue legality."*

The approach taken by Australia's courts to the public policy exception reflects the pro-enforcement objective of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Model Law. This objective is further reflected in Australia's state and federal commercial arbitration statutes. Sections 2D and 39 of the IAA and sections 1C and 2A of the CAA (similar provisions are also contained in other state arbitration acts) require Australian courts to consider the international provenance of the Model Law and the need to promote certainty and finality in both international and domestic commercial arbitration awards. The Court's decision to award indemnity costs against a party who unsuccessfully challenges an arbitration award on public policy grounds supports the objectives of the Model Law and the New York Convention, as provided for in the IAA and the CAA, and aligns with international best practice.

To the extent that *William Hare* could be seen to detract from Australia's pro-arbitration attitude, the decision should be regarded as at odds with the overwhelming weight of judicial authority and statutory intention, and confined to the particular facts of that case.

CONCLUSION

Commercial litigants can take comfort in the uniformity of the approach taken by Australian courts in refusing to allow the factual findings of a tribunal to be re-agitated in the courts in the name of natural justice. The willingness of Australia's courts to award indemnity costs in respect of an unsuccessful challenge on public policy grounds provides further reassurance.

These recent decisions underline the commercial attraction and benefits of Australia's arbitration and legal system to international commercial litigants. 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.

MORE INFORMATION

For more information, please contact:

Gitanjali Bajaj
Partner
T +61 2 9286 8440
gitanjali.bajaj@dlapiper.com

Allan Flick
Solicitor
T +61 2 9286 8357
allan.flick@dlapiper.com

Or contact your nearest DLA Piper office:

BRISBANE

Level 28, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace Perth
WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 22, No. 1 Martin Place
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

1209842927 | 07|15