DLA PIPER

7 NOVEMBER 2014

LITIGATION UPDATE:

COURT'S REFUSAL TO ENFORCE AN AWARD ON PUBLIC POLICY GROUNDS: A STEP BACKWARD FOR INTERNATIONAL ARBITRATION IN AUSTRALIA?

In recent years, Australian courts have confirmed the "sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions" [1], assuring parties to a dispute that the Australian judiciary has a pro-enforcement attitude towards foreign arbitral awards consistent with international standards and norms for enforcement. The recent judgment handed down by the Supreme Court of New South Wales in *William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403* however prompts some concern that the Australian judiciary may still blur the dichotomy between the powers of the arbitral tribunal and the Court, casting doubt on the supremacy of the principles of non-interference by courts and the finality of arbitral awards.

On 14 October 2014, the Supreme Court of New South Wales (NSW) held that part of an arbitral award could be severed and precluded from enforcement on grounds of public policy under section 8(7)(b) of the *International Arbitration Act 1974 (Cth)* (IAA). The Court held that a breach of the rules of natural justice occurred by the arbitral tribunal in making that part of the award.

BACKGROUND OF THE DISPUTE

The plaintiff and defendant were party to a construction subcontract, which provided for the resolution of disputes by arbitration seated in Abu Dhabi, under the rules of the Abu Dhabi Chamber of Commerce and Industry. A dispute arose as to the final amount due under the contract and the payment of retention monies. A final arbitration award was issued on 1 May 2013 ordering the defendant to make two payments to the plaintiff: $797,500 in respect of retention monies and $50,000 in respect of a discount offered by the plaintiff in the final account.

In the proceedings initiated by the plaintiff in the Supreme Court of NSW seeking enforcement of the foreign arbitral award in Australia, the defendant resisted the enforcement on the basis that it would be contrary to public policy under section 8(7)(b) IAA as a breach of natural justice occurred in connection with making the award.

[1] Gary Born, *International Commercial Arbitration*, Vol.II, 2009, p.2965

The controversy before the court related to the part of the award for $50,000 in favour of the plaintiff. In its Request for Arbitration of 24 October 2012, the plaintiff sought relief in terms expressed as *"Claimant* [plaintiff] *therefore seeks repayment of the additional USD $50,000*." In addition, in May 2013, the parties and tribunal signed the "Terms of Reference and Arbitration Agreement" (TRAA). Schedule 4 of the TRAA summarised the plaintiff's claim, making it clear that the plaintiff was seeking an order for US $797,500 and an order for payment of US $50,000. The TRAA also summarised the defendant's defence which acknowledged that the plaintiff sought recovery of the sum of US$50,000. This claim for $50,000 was however omitted from the subsequent Statement of Claim and the defendant submitted that as it was not addressed by either party in their submissions, it should have been regarded as having been abandoned or no longer maintained. The defendant contested that if the tribunal was considering ordering the payment of $50,000, under the principles of fairness and equality of treatment of parties, the tribunal should have notified the defendant and invited them to address the claim.

His Honour, Justice Darke, agreed with the defendant's submissions stating *"that in the absence of any explicit statement by the plaintiff that the claim for US $50,000 was still maintained despite its absence from the Statement of Claim, the claim ought reasonably have been treated by all concerned as no longer pressed."* His Honour held that "*if the tribunal took a different view and considered that it remained open to deal with that claim…I think that fairness required the tribunal to give notice of its view to the parties*." His Honour, therefore, deemed the defendant to have suffered real unfairness and real practical injustice by the arbitral tribunal ordering the payment of $50,000 and refused to enforce that part of the award.

His Honour held that the order for the payment of $50,000 could be severed from the rest of the arbitral award pursuant to section 8(7) of the IAA. His Honour stated that it did not appear to him that *"enforcement of parts of awards not affected by any fraud, corruption or breach of the rules of natural justice is in any way offensive, or contrary, to the principles of justice."* His Honour further noted that severance of the arbitral award *"promotes the efficient and fair enforcement of international arbitration awards."*

IMPLICATIONS OF THE DECISION

The decision appears to go further than other recent decisions on setting aside of arbitration awards on the grounds of public policy. In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131* the Federal Court held that the public policy exception in 8(7)(b) should be narrowly interpreted and noted that courts do not have a general discretion to refuse enforcement and do not necessarily need to examine the correctness of the tribunals reasoning in reaching a decision in order to enforce an award. Similarly, the New Zealand Court of Appeal previously held that to establish that enforcement of an arbitral award, the enforcement ought to "*shock the conscience*" (*Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at 569-570).

In May 2014, the Federal Court acknowledged in *Emerald Grain Pty Ltd v Agrocorp International Pty Ltd [2014] FCA 414* that in order for principles of natural justice to be breached it needs to be demonstrated that the tribunals reasoning and decision was not reasonably foreseeable by the parties. Similarly, a few months later the Full Court of the Federal Court, in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83*, held that a breach of natural justice may occur when *"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."* The Full Court indicated that even though there are limited routes available for the refusal to enforce arbitral awards, courts do not retain any inherent power or right of oversight for arbitral awards.

The contradiction here is that the parties in *William Hare* were both aware of the possible payment of $50,000 from the chronology of the arbitration documents. Incidentally, in the Statement of Claim the plaintiff also sought an order for *"such other relief as the Tribunal deems appropriate"*, an order commonly sought in arbitrations as a "catch-all." If the previous Australian authorities were to be precisely followed, the factual circumstances of this case do not readily lead one to the conclusion that a breach of natural justice had occurred. The reasoning in *William Hare* arguably appears to undermine the power of arbitral tribunals to *"conduct the arbitration in such a manner as it deems appropriate"* (for example, see *Article 17(1)*

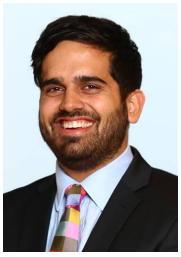
UNCITRAL Arbitration Rules 2011; Article 17(1) ACICA Arbitration Rules 2011; Rule 16.1 SIAC Rules 2013) and the ability of parties to independently consent to submit a dispute to arbitration and agree *"on the conduct of their arbitral proceedings"* (for example, see *Article 6(1) ICC Rules of Arbitration 2012; Article 14.1 LCIA Arbitration Rules 1998*).

The unanimous decision by the Full Court of the Federal Court in *TCL Air Conditioner* was seen to herald Australia's pro-arbitration attitude for the future, however the decision in *William Hare* raises some concerns that the previous positivity of the Australian judicial system towards arbitration and the enforcement of arbitral awards could be detracted from.

MORE INFORMATION

For more information, please contact:

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



Kirk Simmons
Senior Associate
T +61 2 9286 8111
kirk.simmons@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 8007
sydney@dlapiper.com

www.dlapiper.com

1202218499 ASL 11|14