SQUIRE PATTON BOGGS

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Introduction

International arbitration is now the preferred forum for the resolution of disputes arising out of all forms of commercial transactions. With that in mind, this issue of Construction Matters is dedicated to providing you with an update on recent trends and developments in international commercial arbitration.

Squire Patton Boggs has been ranked as one of the world's leading international arbitration firms by Global Arbitration Review for the past 3 years.

The Trend in Favour of International Arbitration

Trends and Implications

We have observed a clear trend for arbitrating in the Asia Pacific region. In fact, China International Economic and Trade Arbitration Commission (**CIETAC**), Hong Kong International Arbitration Center (**HKIAC**) and Singapore International Arbitration Center (**SIAC**) now administer more than 50% of all arbitrations.

In particular, Singapore has seen a significant increase in the number of international arbitrations. This is largely attributable to rapid economic growth, but also the concentrated efforts of the Singaporean government to promote the country as an arbitral seat. Subsequently, SIAC's caseload has nearly quadrupled in the past decade. It is now considered to be the leader for high-profile and high-value arbitration disputes in the Asia Pacific region.[1]

Globally, the International Court of Arbitration (**ICA**) is regarded as the leading arbitration institution, given the high number of foreign-related disputes it administers. Relevantly, in 2016, a total of 966 new cases were administered by the ICA, with these cases involving 3,099 parties from 137 countries.

We expect that, barring dramatic changes in current global political and economic landscapes, arbitration activity will continue to grow, as indicated by the fact that the ICA posted a record number of 1,592 pending arbitration cases at the start of 2017. It is also expected that non-western arbitration hubs (especially Singapore) will continue to be at the centre of arbitral activity.

Therefore, global conditions, as well as the establishment and accessibility of arbitral institutions, provide the backdrop to international arbitration becoming the preferred forum for resolution of disputes arising out of all forms of commercial transactions.

Attractions of Arbitration

The increasing popularity of international arbitration has been founded upon an unrelenting focus on speed, privacy and informality by arbitral institutions. Speed, privacy and informality result in significant cost reduction. Consequently, international arbitration is increasingly regarded as a more cost effective alternative to litigation.

More recently, the following characteristics of international arbitration have also proved attractive to commercial disputants:

Chess-Clock Arbitration

- A time management technique finding favour, , designed to reduce the length and financial cost of hearings.
- Where the parties agree to adopt the "chess-clock method", the duration of the hearing is strictly prescribed in advance.
- Time is allocated between the tribunal and the parties (some of the available time is also provided for the tribunal to question parties and witnesses).
- Time is allocated to each party equally, to use as the parties themselves see fit.
- Once time has elapsed, no further oral submissions are allowed and extensions are rarely granted, unless agreed between parties.
- The chess-clock method prevents one party using up a disproportionate amount of time.
- We have observed that the chess-clock method focuses parties' minds on the strengths and weaknesses of their respective positions and motivates them to explore commercial resolution earlier than may otherwise be the case.

1 In 2016, SIAC administered its highest value arbitration case, being for US$3.47 billion, with the total sum in dispute for new case filings equalling US$11.85 billion.

Efficient Timetables

- To control time and costs of international arbitrations, tribunals are encouraged to apply timetables designed to be as efficient as possible.
- For example, the International Chamber of Commerce Commission's Report on Arbitration explains that, when deciding upon the length of the final hearing and the amount of time required for all procedural steps up until that hearing, tribunals should choose the shortest times that are realistic.
- Tribunals will be reluctant to agree to extensions and revisions of the timetable, which are reserved for circumstances in which they are considered justified.[2]
- This emphasis on efficiency is increasingly popular in international arbitration, for it prevents disputes simply "drifting" through a resolution process without sight of a timely determination.

Increased Awareness of Limited Disclosure Requirements

- We have noticed that participants in international arbitration better understand the limited disclosure requirements associated with arbitral proceedings.
- It is important for the parties to closely consider the volume which they expect the Tribunal to read and digest, particularly in hearings where time is limited.
- Limited disclosure models promoting the advancement of only the material intended to be used or referred to are, therefore, becoming more widely practiced.

Conclusion

Whilst the increased popularity of international arbitration has been particularly noticeable in the Asia Pacific region, it is also recognisable on a global scale. The trend can be attributed to the modern political and economic landscape and an understanding in the market of the applicability of arbitral tools designed to improve procedural efficiency. That being so, the trend in support of international arbitration will continue.

Hancock Prospecting Pty Ltd v Rinehart: A Promotion of the Jurisdiction's Arbitration Capabilities

Introduction

The recent decision in *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 of Chief Justice Allsop and Justices Besanko and O'Callaghan in the Full Federal Court of Australia (**the Full Court**) examined the extent to which the courts will infer an intention by the parties to deal with all relevant disputes by way of arbitration.

Key Findings

The Full Court held that an arbitration agreement that applied to "any dispute under this deed" could not be limited to disputes governed or controlled by the operation of the deed itself. The Full Court, therefore, adopted a "wider" objective view on the intention of the parties.

This decision essentially rejected the New South Wales Court of Appeal's "narrow" interpretation of provisions associated with arbitration agreements, in favour of an approach that applies common sense and the objective intention of the parties.

Implications

This case settled the uncertainty as to the Australian Court's approach towards interpreting arbitration agreements.

The court's decision will enhance Australia's reputation as a jurisdiction well suited to hosting commercial arbitrations.

Background

Prior to this decision, the position of the Australian Courts' on this issue was unclear due to conflicting views on the courts' approach in interpreting arbitration agreements.

In forming her primary decision, Justice Gleeson adopted the decision in *Rinehart v Welker*,[3] taking a narrow approach when interpreting arbitration agreements by interpreting the definition of "any dispute under this deed" to relate to only those disputes "governed or controlled" by the deed.[4]

This case was heard on appeal from an interlocutory application under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**CAA Act**), for a stay of proceedings for alleged breaches of fiduciary duties or, in the alternative, for being complicit in those breaches.

The applicants disputed the allegations and sought to rely upon several deeds that provided releases in relation to the above claims.

The respondents held that the deeds were invalid and, irrespective of that fact, the arbitration agreements within the deeds were not applicable to the dispute, as they were not a dispute "under this deed".

The CAA Act provides that an action must be stayed if it is the "subject of an arbitration agreement" except in cases where the arbitration agreement is "null and void, inoperative or incapable of being performed." The key issue for the courts was then whether the disputes in regard to the deeds were subject to the arbitration agreements.

2 With a high threshold required to be met.

3 [2012] NSWCA 95.

4 [2017] FCAFC 170, [161].

In the first instance, Gleeson J held that by applying *Rinehart v Welker*, the disputes were not in relation to the validity of the deeds and therefore the disputes were not "under" the respective deeds.

The application was dismissed and the applicants appealed the decision.

Decision

The Full Court reversed Gleeson J's decision and held that an arbitration agreement that applied to "any dispute under this deed" could not be limited to disputes governed or controlled by the operation of the deed itself.

The main issue was the interpretation of the word "under" to which the Full Court concluded that the correct approach was an approach that construed the clause in such a way as to provide for dispute resolution in one place, rather than two.

Upon the implementation of this approach, the Full Court held that words permitting the disputes to be heard in one place should be interpreted liberally to encompass a much broader range of disputes.[5] From this finding, all of the disputes that concerned the deed were held to be "under" the respective deeds and, therefore, a part of the arbitration agreement.

On this basis, the Full Court allowed the appeal and dismissed the cross-appeals and notice of contentions. Further, the court ordered that the proceedings brought by the applicants be stayed under s 8(1) of the CAA Act.

Federal Court Confirms Judicial Reluctance to Intervene in Arbitration

Introduction

The decisions of Justice Beach in *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648 and *Hui v Esposito Holdings Pty Ltd* [2017] FCA 728) examined the extent to which the court is able to review and alter the actions of an arbitrator under Articles 12, 18 and 34 of the UNCITRAL Model Law on International Commercial Arbitration 1985, incorporated into the International Arbitration Act 1974 (Cth).

Key Findings and Implications

Justice Beach held that certain parts of the two partial awards ought be set aside and the arbitrator removed on the basis that the arbitrator, during the preliminary hearing, decided upon issues relating to the availability of the set off defences and the merits of those defences, despite the parties and the arbitrator agreeing that the hearing would not concern these issues.

Justice Beach found that the actions of the arbitrator were such that the applicants could no longer have confidence in him and, therefore, the relevant parts of the first and second partial award were set aside.

This decision provides a valuable example of the high threshold required to be met before the courts will intervene to invalidate an arbitral award. Even then, the court in this instance managed not to intervene in all aspects by allowing the parties to make further submissions as to the process in deciding the remaining issues of the arbitration.

Beach J's decision also provides confirmation that the Australian courts remain separate from arbitral proceedings until they are required to safeguard the processes and parties of the arbitral process from injustice.

Background

The arbitration concerned a share sale agreement between Esposito Holdings Pty Ltd and UDP Holdings Pty Ltd in relation to shares in 5 Star Foods Pty Ltd, where Mr Hui acted as the guarantor for UDP. In October 2014, Esposito served a notice of arbitration on UDP, 5 Star Foods and Hui claiming an unpaid balance of moneys under the UNCITRAL Arbitration Rules.

Esposito sought a preliminary hearing to determine some parts of its claim and this request was granted, although it was agreed that the parties would not touch upon the defences and set offs. However, at the hearing, the arbitrator made a partial award and, in his reasoning, included the unavailability of defences and set offs.

Hui, UDP and 5 Star Foods (the respondents) challenged the arbitrator's decision and requested that the partial award be set aside and that he withdraw as an arbitrator. The arbitrator declined to recuse himself, claiming that he was within the scope of his jurisdiction in deciding the issues.

The respondents then commenced proceedings in the Federal Court of Australia.

Decision

According to Beach J, in order for Art 34 of the UNCITRAL Model Law to apply, there must have been "real unfairness" or "real practical injustice" in denying a party to present its case. Beach J detailed that this is possible to make out in situations where there was a "realistic rather than fanciful possibility that the award may not have been made or may have differed...favourable to the party said to have been denied the opportunity".

In coming to his decision, Beach J applied the test espoused by Art 34 and held that there was a real issue as to who had contractual liability and the availability of any set-off. It was held that the applicants' arguments were reasonably arguable and, accordingly, the applicant had been denied a valuable opportunity.

5 [2017] FCAFC 170, [193].

Beach J also analysed the scope of Art 18 of the UNCITRAL Model Law and outlined the requirements that each party had equal treatment and a "full opportunity" to present their case.

It was decided that a reasonable person in the shoes of the applicant could not have reasonably foreseen that the arbitrator would go beyond the scope of the hearing and the applicants were therefore denied a reasonable opportunity to present their case.

Article 12 of the UNCITRAL Model Law was also applicable to the facts in regard to arbitrator impartiality and the "real danger of bias" test under s 18A(2) of the *International Arbitration Act 1974* (Cth). Beach J outlined that a real possibility of prejudgement can satisfy this test.

The court held that the arbitrator had acted in such a manner that the applicants would no longer hold any confidence in him. Pursuant to Art 34 of the UNCITRAL Model Law, Beach J set aside the first and second partial award.

Issuing Subpoenas for Foreign-Seated Arbitrations: A Jurisdictional Snag

The decision of Justice Gilmour in the Federal Court of Australia (**FCA, the Court**) (*Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169) examines whether Australian courts have capacity to grant leave to issue subpoenas under s 23 of the *International Arbitration Act 1974* (Cth) (**the IAA**) for foreign arbitral proceedings.

Key Findings and Implications

Gilmour J held that the application brought by Samsung C&T Corporation (**Samsung**) ought to be dismissed (and leave refused) on account of three issues surrounding the concept of jurisdiction:

- The proper construction of s 22A of the IAA meant that the FCA was not an appropriate court for this application and, therefore, the court does not have jurisdiction to grant leave to issue subpoenas.
- Samsung's alternative submission that the nexus between the jurisdictions should overcome any other jurisdictional issues was "rather faintly put".
- Samsung had previously sought the issuance of a letter of request under The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (**the Convention**) (widely considered to be the usual course of proceedings). However, in the 5 September 2017 proceedings, Samsung submitted that s 23 of the IAA was the *only* available avenue for issuing subpoenas. In addressing this issue, Gilmour J outlined the process for issuing subpoenas under Art 1 of the Convention and stated that parties may also apply to the WA Supreme Court (under Art 2) for assistance in obtaining evidence in a court or tribunal outside WA under ss 115-118 of the *Evidence Act 1906* (WA) and O 39 of the *Rules of the Supreme Court 1971* (WA).

This decision will re-enliven discussion as to the various ways of overcoming the impracticalities of a narrow interpretation of the IAA. A practical way to do so would be to draft clauses into contracts that require lower-tier contractors to provide documents upon written request.

Background

Parties to contracts on major projects with a connection to Australia frequently arbitrate disputes elsewhere.

The nature of international arbitrations means that it is often necessary to obtain evidence from outside the jurisdiction in which the arbitral proceeding is seated.

Subpoenas are a powerful tool in litigation and arbitration and can be used to compel the attendance of parties or the production of documents. That being the case, subpoenas, both by courts in Australia and overseas, have long been recognised for their importance in the administration of justice.

Unlike courts in a litigious setting, arbitral tribunals do not have the power to compel a third party to produce documents. Instead, they ordinarily require the assistance of a court that exercises jurisdiction over the third party to issue a subpoena against them.

Samsung and Duro Feguera Australia Pty Ltd are parties to an international arbitration concerning the construction of the Roy Hill iron ore mine in Western Australia. The arbitration is governed by the UNCITRAL Arbitration Rules 2013, seated in Singapore, administered by the Singapore International Arbitration Centre and subject to the governing law of Western Australia.

Samsung was granted permission by the arbitral tribunal in Singapore to apply to the Court for the issuing of subpoenas under section 23 of the IAA, which relevantly provides:

"1. A party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court to issue a subpoena under subsection (3).

2. However, this may only be done with the permission of the arbitral tribunal conducting the arbitral proceedings.

3. The court may, for the purposes of the arbitral proceedings, issue a subpoena requiring a person to do either or both of the following:

   a. To attend for examination before the arbitral tribunal;

   b. To produce to the arbitral tribunal the documents specified in the subpoena

. . .

6. Nothing in this section limits Article 27 of the Model Law."

Pursuant to section 22A of the IAA, a "court" includes a court in a state or territory and "in any case – the Federal Court of Australia".[6]

On 21 March 2017, Gilmour J made orders granting Samsung leave to issue subpoenas.

However, despite granting Samsung's first application, Gilmour J refused to grant the second application on 5 September 2017, even though the application was brought on grounds substantially similar to the initial application.

In refusing the application, Gilmour J considered that his own previous decision to grant leave in respect of the first application was "clearly wrong" and that, ultimately, the FCA did not have jurisdiction to issue subpoenas in a foreign-seated arbitration.

6 s 22A(c).

Decision

According to Gilmour J, in order for s 23 of the IAA to apply, two pre-conditions needed to be satisfied, namely whether the court:

- had jurisdiction; and
- was satisfied that issuing the subpoenas was "reasonable".

Jurisdiction:

Samsung submitted that the Singapore International Arbitration Act 2012 (SIAA) only permits the summoning of witnesses located in Singapore (s 13(2)) and, subsequently, the IAA is the only mechanism available for issuing subpoenas to non-parties in Australia. In the alternative, Samsung submitted that if there exists a territorial limitation on the FCA to issue subpoenas under s 23, the nexus between Australia and the arbitration in question is "real and substantial" and should overcome territorial limits on jurisdiction.

Gilmour J found that, upon a proper construction, s 22A and s 23 of the IAA concerns domestic arbitral proceedings and not foreign-based arbitral proceedings. Accordingly, it was held that the FCA had no jurisdiction to grant leave to issue subpoenas relating to an arbitration commenced in Singapore.

Samsung's argument in reference to the "constitutional conceptions of predominant territorial nexus inherent in the federal compact and the nature of judicial power" was also dismissed by Gilmour J, who explained that the submission was "rather faintly put and I do not accept it".

In coming to this decision, Gilmour J also held that the context and purpose of s 22A of the IAA supports a construction that it only applies to arbitral proceedings seated in a State or Territory of Australia. To this end, if a third type of arbitral proceedings was allowed, it would be inconsistent with the purposes of the IAA.

Gilmour J also rejected Samsung's submission that because the Singaporean courts have no jurisdiction to issue subpoenas outside of Singapore, s 23 functioned as the only avenue open to parties seeking disclosure of documents. In doing so, Gilmour J noted issuance of a letter of request made pursuant to the Convention which was made by Samsung in its first application. He went on to state that under Article 1 of the Convention, a letter of request may be sent for the taking of evidence from one contracting state to the other. In doing so, the parties may apply to the WA Supreme Court (under Art 2) for assistance under ss 115 – 118 of the *Evidence Act 1906* (WA) and O 39 of the *Rules of the Supreme Court 1971* (WA).

Reasonable:

Gilmour J did not discuss the issue of reasonableness further, having already found that the first pre-condition relating to jurisdiction had not been satisfied.

For the above reasons, Gilmour J refused leave to issue subpoenas and dismissed the application.

Implications

In coming to his decision, Justice Gilmour adopts a narrow interpretation of the meaning of "court" in s 22A of the IAA, concluding that the definition is to be determined by reference to the geographical location of the arbitration proceedings.

By restricting the scope of s 22A, Gilmour J's decision confines the process of applying for the issuance of subpoenas to non-related and non-jurisdictional persons to the application process available under the Convention. This is the case even where a nexus exists between the parties to the arbitration and the domestic jurisdiction.

This decision will have widespread implications with Australian entities frequently involved in international projects and transactions subject to agreements to arbitrate disputes outside Australia.

While parties to a foreign-seated arbitration cannot rely on s 23 of the IAA to obtain documents by subpoena in Australia, the court has outlined possible alternative avenues for parties to obtain such documents, including under the Convention. However, it is likely that proceedings under the Convention, as recommended by the courts, would involve greater time and complexity than applying to an Australian court.

That being said it is an interpretation that, partically speaking, seems at odds with the objectives of international arbitration; being to serve as a trans-national tool, supported by domestic courts.

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