HFW

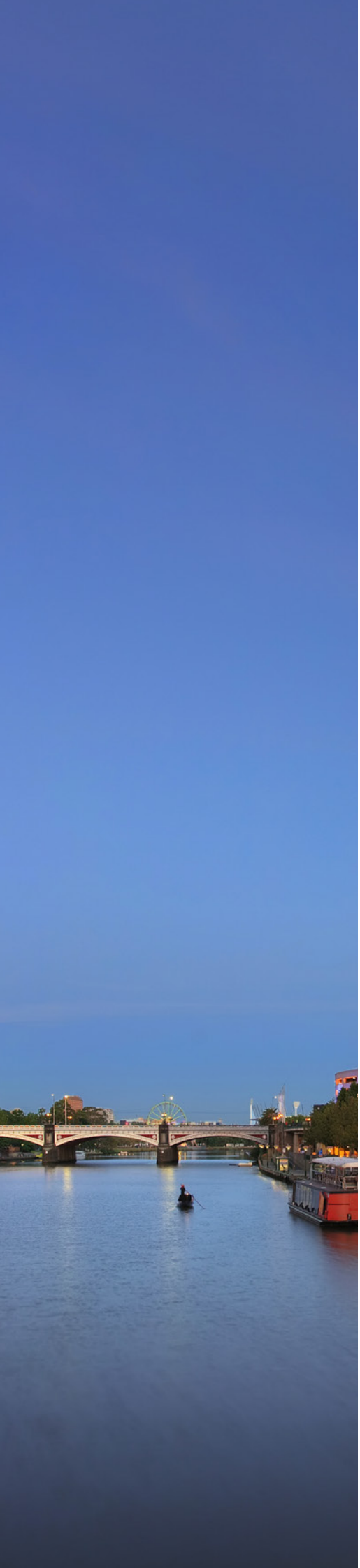
ARBITRATION LAW IN AUSTRALIA
2021 YEAR IN REVIEW

Key developments in the Australian courts

2021 saw a diverse range of novel and interesting arbitration related questions arise in the Australian courts.

In this newsletter, HFW charters some of the key developments arising from these cases before the courts, ranging from clarifying the scope of an arbitration agreement for non-contractual claims to addressing ICSID award enforcement relating to Spanish solar farm industry investments.

The Australian courts continue to support the arbitral process, contributing to a rise in the volume of arbitrations seated in Australia and/or related to Australian transactions and projects, as highlighted by the cases considered in this review.



Scope of arbitration agreements

The courts continue to acknowledge the *komptenz-kompetenz* principle when considering the scope of an arbitration agreement for the purpose of granting a stay of court proceedings pursuant to section 7(2) of the *International Arbitration Act 1974* (Cth) (IAA).

However, whether the courts adopt a "prima facie" or a "full merits" approach depends on the circumstances of each case. In most cases, the courts will adopt the "prima facie" approach. Nonetheless, the courts continue to reserve the right to fully consider and determine the existence and scope of the arbitration agreement in certain cases.

The courts also continue to refer statutory claims, such as claims under the *Australian Consumer Law* (ACL)[1] to arbitration where the claims relate to an agreement between the parties even in circumstances where:

- the arbitration is seated outside Australia as in *Freedom Foods Pty Ltd v Blue Diamond Growers*;[2] or
- the ACL claims relate to pre-contractual representations as in *CPB Contractors Pty Ltd v DEAL S.R.L.*.[3]

These decisions highlight the support of the Australian court for the autonomy of the parties' in referring all disputes relating to their agreements to arbitration, including related statutory claims.

Setting aside arbitral awards

In *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd*,[4] the WA Supreme Court set aside an award on the basis that the tribunal lacked jurisdiction. The court held that as the arbitral tribunal had already decided on the issue of liability in an earlier interim award, it was *functus officio* with respect to those issues in a second interim award. This decision was appealed.

The case highlights the potential risks of bifurcation of arbitral proceedings, and the need to clarify precisely the issues to be considered during each phase of the proceedings.

Enforcement of awards

The courts have considered the distinction between "recognition", "enforcement" and "execution" of arbitral awards finding that:

- there is no need for the courts to recognise or enforce an award that has been satisfied, as in *EBJ21 v EBO21*;[5]
- as the court must recognise an award before proceeding to enforce it, there is no need to consider the "enforcement" or "execution" of an award in recognition proceedings, as in *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l (No. 3)*.[6]

In the appeal commenced by Spain, the court also held that Spain had waived any immunity it may have had under the *Foreign States Immunities Act 1985* (Cth) with respect to recognition of the ICSID awards as Spain is a party to the *International Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention). Article 54 of the ICSID Convention provides that State parties must recognise awards rendered pursuant to the ICSID Convention.

Further, the courts have emphasised the importance of complying with the terms of an arbitration agreement when appointing the arbitral tribunal. The court refused the enforcement of an award for not complying with the agreed appointment process.

Whilst these cases indicate the pro-enforcement approach of the courts, they also indicate that the courts understand the importance of party autonomy, and holding parties' to the agreement reached.

Footnotes:

1 *Competition and Consumer Act 2010* (Cth), Schedule 2, *Australian Consumer Law*.
2 [2021] FCA 172 and [2021] FCAFC 86.
3 [2021] NSWSC 820.
4 [2021] WASC 323.
5 [2021] FCA 1406.
6 [2021] FCAFC 112.

To stay or not to stay: The scope of arbitration agreements

Freedom Foods Pty Ltd v Blue Diamond Growers

In *Freedom Foods Pty Ltd v Blue Diamond Growers*,[1] the Federal Court of Australia (FCA) granted a stay of court proceedings on the basis that the parties had entered into an arbitration agreement. In doing so, the court found that the contract between the parties was not a "franchise agreement" and thus, the Franchising Code of Conduct (Franchising Code) did not exclude the arbitration clause.

Freedom Foods appealed the decision to the Full Court of the Federal Court of Australia (Full Court) on the basis that the Agreement was a franchise agreement, and sought orders restraining the arbitration if the appeal was successful. The Full Court dismissed Freedom Foods appeal, and upheld the stay orders.

Commencement of multiple proceedings

Freedom Foods group (Freedom Foods), an Australian food and beverage product manufacturer, entered into a licence agreement (Agreement) with Blue Diamond Growers (Blue Diamond), a cooperative of nearly 3000 independent Californian almond growers based in California, USA.

Under the Agreement, Freedom Foods was granted exclusive rights to manufacture and sell almond milk products under the name "Almond Breeze". This right was initially for a 5-year period. The Agreement was automatically renewed. The laws of California governed the Agreement, and all disputes under or in connection with the Agreement were to be referred to arbitration, and heard in California.

Blue Diamond commenced arbitration claiming that Freedom Foods was in breach of the Agreement. Blue Diamond also commenced proceedings in the US District Court of California.

Freedom Foods applied to the FCA seeking an injunction restraining Blue Diamond from proceeding with the arbitration. Freedom Foods also sought, amongst other things, declarations that it had complied with the Agreement, that Blue Diamond had engaged in misleading or deceptive conduct and unconscionable conduct in breach of the ACL, and that the Agreement was a franchise agreement under the Franchising Code and hence, the arbitration clause was of no effect.

Blue Diamond applied for the FCA proceedings to be stayed in favour of the arbitration clause in the Agreement pursuant to section 7(2) of the IAA.

At first instance, the FCA had rejected the arguments of Freedom Foods and granted a stay of the proceedings in favour of the arbitration. Freedom Foods appealed that order.

Arbitration clause not excluded

Freedom Foods argued that the arbitration clause was of no effect as the Agreement was a franchise agreement.

The Franchising Code provides that a franchise agreement must not contain a clause that requires a party to commence legal proceedings in a jurisdiction outside Australia, and that such a clause if it existed, is void. This means that an arbitration clause that provides that the seat of the arbitration be outside Australia is of no effect.

The FCA found that the Agreement was not a "franchise agreement" for the purpose of the Franchising Code and thus, the arbitration clause in the Agreement remained in effect.

Stay granted in favour of arbitration

Freedom Foods argued that its claims relating to breach of the ACL were matters of Australian law that were to be determined by the Australian courts, and not by an arbitral tribunal seated in California. This argument was disputed by Blue Diamond, and subsequently rejected by the FCA.

> "The FCA's approach is consistent with a number of previous decisions of the Australian courts"

The FCA held that matters relating to the ACL may be referred to arbitration, and that those claims may be heard and determined by the arbitral tribunal in accordance with Australian law. The US courts had confirmed that competition law issues were arbitral, and may be referred to arbitration (*Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*).[2] The FCA also acknowledged that the arbitral tribunal was required to apply the ACL as the relevant mandatory law.

The FCA's approach is consistent with a number of previous decisions of the Australian courts, which have held that ACL claims may be referred to arbitration, as discussed in the next case.

CPB Contractors Pty Ltd v DEAL S.R.L

In *CPB Contractors Pty Ltd v DEAL S.R.L.*,[3] the NSW Supreme Court granted a stay in favour of an arbitration in order for the arbitral tribunal to consider claims under the ACL relating to pre-contractual representations pursuant to section 7(2) of the IAA.

Commencement of court proceedings

CPB Contractors Pty Ltd (CPB) and DEAL S.R.L (DEAL) had entered into an agreement relating to works to be carried out as part of the WestConnex M4 Project (Agreement). The Agreement provided that "any dispute, controversy or claim arising out of, relating to, or in connection with this Agreement" must be resolved by arbitration under the ICC Rules.

CPB commenced court proceedings claiming that DEAL had engaged in misleading or deceptive conduct in breach of the ACL. The alleged conduct included pre-contractual representations allegedly made by DEAL.

DEAL applied to the court for a stay arguing that any claims relating to the Agreement, including any ACL claims, should be brought in arbitration in accordance with the arbitration clause. DEAL also argued that the issue of whether the dispute was covered by the arbitration clause was to be determined by the arbitral tribunal in accordance with the *kompetenz-kompetenz* principle. This principle provides that an arbitral tribunal has the power to determine its own jurisdiction.

Justice Rees agreed and granted a stay of the proceedings.

Prima facie vs full merits approach

Justice Rees acknowledged that the *kompetenz-kompetenz* principle was reflected in Article 16 of the Model Law. Article 16 provides that the tribunal has the power to decide its own jurisdiction and thus, whether or not a dispute falls within the arbitration agreement.

Justice Rees considered how the *kompetenz-kompetenz* principle had been applied by the Australian courts, including the High Court in *Rinehart v Rinehart*[4] which was on appeal from the Full Court in *Hancock Prospecting Pty Ltd v Rinehart*.[5] In that case, the Full Court considered whether to take a "prima facie" approach or a "full merits" approach to considering the scope of the arbitration agreement. The Full Court commended the "prima facie" approach acknowledging that it was not appropriate in all cases.

In the present case, Rees J acknowledged that it could fully consider and determine the existence and scope of the arbitration agreement. However, her Honour also acknowledged that "generally speaking, [the court] should leave these matters to the arbitrator unless the context in which these questions arise make it preferable for the Court to determine such matters".[6]

Justice Rees held that the "prima facie" approach should be adopted as there was "nothing particularly unusual about the context in which the scope of the arbitration clause is to be considered".[7]

ACL claims covered by arbitration agreement

In applying the "prima facie" approach, Rees J acknowledged that the arbitration agreement was broadly worded, and found that it covered pre-contractual representations and claims that such representations constituted misleading or deceptive conduct in breach of the ACL.

In reaching this conclusion, Rees J referred to previous authorities that have held that ACL claims were covered by the arbitration clause, including *IBM Australia Ltd v National Distribution Services Pty Ltd*[8] and *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd*.[9]

Having found that there was a valid arbitration agreement that covered the claims brought by CPB, Rees J stayed the proceedings.

Conditions

CPB requested the court to impose conditions when staying the proceedings. In particular, CPB requested a condition that DEAL not raise any defence as to the expiry of the limitation period. CPB had commenced the court proceedings on the last day of the limitation period. CPB had then waited 8 months before serving the originating process on DEAL.

Justice Rees acknowledged that the court should only grant conditions if such conditions were incidental or ancillary to the achievement of the main purposes of section 7(2) of the IAA. In this case, Rees J found that the conditions were not.

Justice Rees considered whether CPB had commenced the proceedings properly, whether the potential expiration of the limitation period was due to the delay of DEAL or other events beyond the parties' control, whether the condition would substantively alter the rights of the parties or preserve the status quo and whether the condition will change the agreement of the parties to arbitrate. Her Honour found that due to the conduct of CPB in commencing and serving the proceedings, the conditions would distort the substantive rights of the parties in any arbitration.

The court's approach indicates the reluctance of the court to impose conditions unless it is satisfied that such conditions are incidental or ancillary to the purpose of section 7(2) of the IAA.

Footnotes:

1 [2021] FCA 172.
2 (1985) 473 US 614.
3 [2021] NSWSC 820.
4 [2019] HCA 13.
5 [2017] FCAFC 170.
6 [2021] NSWSC 820 at [60].
7 Ibid at [65].
8 (1991) 22 NSWLR 466.
9 [2006] FCAFC 192.

Interim award set aside for functus officio

Chevron Australia Pty Ltd v CBI Constructors Pty Ltd

In *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd*,[1] the WA Supreme Court set aside an award on the basis that the tribunal lacked jurisdiction. The court held that as the arbitral tribunal had already decided certain issues, these being issues of liability, in an earlier interim award, it was *functus officio* with respect to those issues. CBI Constructors Pty Ltd has appealed the decision.

Factual background

Chevron Australia Pty Ltd (Chevron) and joint venture contractors, CBI Constructors Pty Ltd and Kentz Pty Ltd (CKJV) had referred a contractual dispute relating to the Gorgon Project to arbitration. The dispute related to payment issues for the supply of labour and staff under the contract. The contract provided that CKJV was to be paid on a costs-reimbursable basis. However, CKJV claimed its labour and staff at higher rates than its actual costs. Chevron had paid those claims and now sought recovery of the amounts that it contended were overpaid to CKJV above CKJV's actual costs. CKJV counterclaimed for additional amounts for which it said Chevron was liable.

Bifurcation and interim awards

The tribunal had ordered the bifurcation of the proceedings between liability and quantum. The tribunal was first to consider whether the costs of CKJV's labour and staff was to be calculated on a cost-reimbursable basis or a rates basis. The answer to this question would have a substantial impact on the quantum dispute and could potentially reduce the time and costs involved in the arbitration.

The tribunal issued an interim award finding that there was no agreement between the parties that CKJV's labour and staff were to be charged on a rates basis.

During the quantum phase, CKJV argued that its "actual costs" (for which it was to be reimbursed) included allowances and other items above that which CKJV had actually paid its personnel. Chevron objected to CKJV's arguments contending that CKJV was re-agitating a liability issue that had already been decided during the liability phase.

The tribunal addressed this issue in a second interim award. The majority found that CKJV was permitted to raise these arguments as part of its quantum submissions. The majority's view was that these items related to the quantification of CKJV's claims, which had not been considered during the liability phase.

Set aside application to the court

Chevron applied to the WA Supreme Court to set aside the second interim award under s34(2)(a)(iii) of the Commercial Arbitration Act 2012 (WA) (CAA). Chevron argued that the tribunal did not have jurisdiction to decide the issue in the second interim award as it was functus officio. The tribunal had already finally determined the relevant issues in the first interim award.

Justice Martin, in a detailed analysis of the second interim award, found that the tribunal had already considered these issues in the first interim award. His Honour emphasised that the first interim award had "unquestionably dealt with all issues of liability of CKJV's claim and Chevron's counterclaim" (emphasis included).[2] The tribunal was not concerned with only some issues of liability but all issues and thus, "it became too late to raise more liability issues later".[3] His Honour found that this was "simply the legal consequence of an engagement with the functus officio doctrine in this particular case".[4]

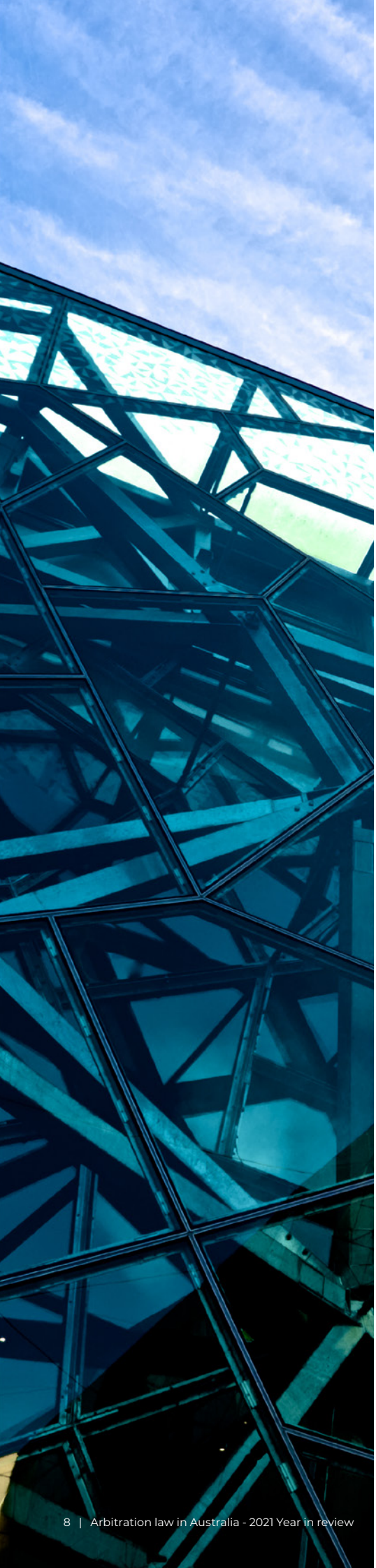
Further, Martin J did not accept that the issues raised by CKJV could be considered to be quantum issues. His Honour agreed with the minority view that they were issues of liability. His Honour also could not accept that there was "unfinished business" relating to the meaning of the term "actual costs".

On this basis, Martin J found that the tribunal did not have jurisdiction to issue the second interim award and for that reason, his Honour exercised his discretion and set aside the second interim award.

Footnotes:

1 [2021] WASC 323.
2 [2021] WASC 323 at [193].
3 Ibid at [194].
4 Ibid at [194].

"His Honour also could not accept that there was "unfinished business" relating to the meaning of the term "actual costs"."



No need to enforce an award already paid

EBJ21 v EBO21

In *EBJ21 v EBO21*,[1] the FCA refused to enforce an award that had been paid by the award debtor. The FCA also issued orders to protect the confidentiality of the parties, the arbitration and the award.

The arbitral award reflecting the agreed terms of settlement was issued on 5 May 2021. The award stated the agreed date on which payment was due and payable. On the same day, the award creditor filed an application for recognition and enforcement of the award as a judgment of the court. On 22 May 2021, two weeks earlier than required, the award debtor paid the award.

The award creditor continued to pursue the enforcement of the award, even though it had already been paid, and sought an order from the court for the sum in the award plus interest. Justice Stewart refused to grant the order requested. Once the amount ordered in the award was paid, there was nothing left to enforce.

Justice Stewart elaborated on the distinction between "recognition" and "enforcement" of an arbitral award, an issue that also arose in the *Hub Street* case, as discussed below. His Honour acknowledged that this distinction was made in Article 35 of the UNCITRAL Model Law. An award is recognised as binding between the parties from the date of the award. From that date, the award may be relied upon with respect to issues of res judicata or issue estoppel. Whilst recognition may be sought as a stand-alone order, it is also a necessary condition for enforcement of an award. Enforcement can only occur when an application is made to a court to enforce the award as a judgment.

Notably, the award debtor sought orders to suppress the identity of the parties and to maintain the confidentiality of the arbitration and documents relating to the arbitration. Justice Stewart issued suppression orders. In doing so, Justice Stewart gave careful consideration to the reasons for confidentiality in arbitration proceedings. His Honour held that he was satisfied that the suppression order "was necessary to prevent prejudice to the proper administration of justice".[2]

Justice Stewart emphasised that:[3]

"The proper administration of justice places a high value on its processes not being used other than for substantial legitimate purposes. It also places a high value on parties observing their agreements and their statutory obligations. The proper administration of justice is prejudiced by a party asserting a legal right ostensibly available to it but with no substantial legitimate purpose to that assertion if the result is to make public that which the parties' agreement and the law otherwise protects as confidential. Should that occur, it is necessary to prevent prejudice to the proper administration of justice by making such orders as may be required to maintain the protection of that confidentiality."

Justice Stewart held that if the court did not grant suppression orders then it would be allowing its processes to be used for no substantial legitimate purpose. Hence, the orders were granted.

Footnotes:

1 [2021] FCA 1406.
2 Ibid at [74].
3 Ibid at [86].

Refusal to enforce an award for failure to comply with the arbitration agreement

Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company

In *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company*,[1] the Full Court has confirmed the importance of the parties complying with the terms of the arbitration agreement. The Full Court refused to enforce an award made by a tribunal that had not been appointed in accordance with the arbitration agreement.

Arbitration seated in Qatar

Energy City Qatar Holding Company (ECQ) and Hub Street entered into a contract for the supply and installation of street light equipment and accessories in Doha, Qatar. ECQ made an advance payment to Hub, which it sought to recover when it later determined not to proceed with the contract. Hub failed to repay the amount advanced.

The contract was governed by Qatari law and provided that English was the language of the contract. The contract contained an arbitration clause which required that any dispute be referred to arbitration before a three-member tribunal, one member being appointed by each party within 45 days of that party receiving a notice of the commencement of the arbitration, and the third member to be mutually chosen by the first two appointees. The arbitration clause also provided that if a decision on the appointment of the third member could not be reached by the party appointees within 28 days, the appointment of the third arbitrator was to be referred to a competent Qatari court.

ECQ did not give notice to Hub under the arbitration clause of the appointment of its arbitrator. Rather, ECQ applied to Qatari courts and obtained orders for the appointment of a three-member tribunal. Hub received notice of the Qatari proceeding seeking the arbitral tribunal's appointment, and when the arbitral tribunal proceeded to hear the dispute, on several occasions, Hub did not participate in that proceeding. The arbitral tribunal issued an award, which found in favour of ECQ and required Hub to repay the money advanced together with compensation and costs.

ECQ applied for the enforcement of the award under s 8(3) of the IAA. Hub resisted enforcement.

Decision of the FCA

At first instance, Hub raised multiple grounds for challenging the enforcement of the award on the basis that:

- it had not received notice of the commencement or conduct of the arbitration;
- it had not received notice of appointment of the arbitral tribunal and the composition of the tribunal was not in accordance with the arbitration agreement;
- it was unable to present its case; and
- the arbitral procedure was not in accordance with the arbitration agreement.

Hub also argued that it would be contrary to public policy to enforce the award due to breaches of natural justice.

At first instance, the FCA enforced the award. The court found that, amongst other things:

- Hub did have notice of the arbitration and thus, it was given an adequate opportunity to present its case. Hub chose not to do so. Hence, there was no breach of the rules of natural justice.
- Hub was given notice of the appointment of the tribunal. As the notice and appointment process was carried out in accordance with Qatari law as the governing law, the court was not satisfied that Hub had not been given notice of the appointment of the tribunal.
- Whilst conducting the arbitration in Arabic rather than English was not in accordance with the arbitration agreement, this was not a reason to refuse enforcement of the award.

Decision of the Full Court

Hub appealed the court's decision on two main grounds, as follows:

- that the composition of the tribunal was not in accordance with the agreement of the parties; and
- that the failure to conduct the arbitration in English was a fundamental departure from the agreed procedure for the arbitration, and this was a matter which should be taken into account in the exercise of the discretion to enforce the award.

The Full Court upheld the appeal accepting the first ground but not the second.

The Full Court gave further consideration to the process by which the arbitral tribunal was appointed. The Full Court found that the Qatari court had proceeded on a misapprehension of a fact that ECQ notified Hub of the arbitrator's appointment, and that Hub failed to respond to that notice. As that was not correct, the Qatari court had appointed the tribunal on an incorrect basis.

As ECQ had not observed the agreed procedure for the arbitrator's appointment, it prematurely applied to the Qatari court for appointment of the arbitral tribunal without giving notice to Hub, which deprived Hub of the opportunity to appoint an arbitrator. ECQ's conduct was contrary to the terms of the arbitration agreement.

The Full Court also considered the fact that the arbitration proceeding was conducted in Arabic rather than English, however it found that Hub did not suffer any prejudice as it had not participated in the proceeding.

The Full Court considered whether it should use its discretion to refuse to enforce the award, and found that the failure to comply with the appointment process set out in the arbitration agreement was "fundamental to the structural integrity of the arbitration: it strikes at the very heart of the tribunal's jurisdiction".[2] The failure to give notice of the arbitration was "equally fundamental".[3]

In reaching its decision, the Full Court emphasised that the relevant evidentiary standard for challenging enforcement of an award was the balance of probabilities.

The Full Court also confirmed that a party may resist enforcement of an award even in circumstances where it has not participated in the proceeding and where it has not applied to set aside the award in the courts of the seat of the arbitration. The Full Court adopted the approach of previous decisions of the Australian courts[4] as well as decisions of the English courts.[5]

"The Full Court gave further consideration to the process by which the arbitral tribunal was appointed."

Footnotes:

1 [2021] FCAFC 110.
2 Ibid at [104].
3 Ibid.
4 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2013) 38 VR 303.
5 For example, *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46.

Recognition, enforcement and execution of ICSID awards

Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l (No. 3)

In *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l (No. 3)*,[1] the Full Court of the FCA recognised two awards issued against the Kingdom of Spain (Spain) in two arbitrations commenced at the International Centre for the Settlement of Investment Disputes (ICSID):[2] *Eiser Infrastructure Ltd and Energia Solar Luxembourg S.a.r.l v Spain (Eiser)*[3] and *Infrastructure Services Luxembourg S.a.r.l and Energia Termosolar B.V v Spain (Infrastructure Services)*.[4]

ICSID arbitrations – Energy Charter Treaty

The awards were issued in arbitrations arising out of changes made by Spain to the regulatory regime it had implemented to incentivise investment in the renewable energy sector in Spain. The investors brought claims for breaches of the Energy Charter Treaty (ECT). The investors argued, amongst other things, that by introducing regulatory changes that adversely affected their investments, Spain was in breach of its obligations to provide fair and equitable treatment under the ECT.

In both cases, the tribunals found that Spain was in breach of the ECT and ordered that damages be paid to the investors. The investors applied for recognition and enforcement of the awards in the FCA pursuant to the IAA. The IAA has implemented the ICSID Convention.

In both cases, Spain argued that it was immune from jurisdiction of the Australian courts with respect to the recognition and/or enforcement of the ICSID awards under provisions of the *Foreign State Immunities Act 1985* (Cth).

Awards enforced by FCA

At first instance, Justice Stewart accepted the distinction between "enforcement" of an award under Article 54(1) of the ICSID Convention and "execution" of an award under Article 54(3) of the Convention.[5] Article 55 provides that domestic foreign state immunity laws apply to "execution" of an award, without referring to recognition or enforcement.

As the investors had only applied for enforcement of the awards, not yet execution, Justice Stewart held that immunity did not arise and the enforcement application was accepted. Justice Stewart also noted that immunity on execution could not be relied upon with respect to commercial property of Spain that was in Australia.

Spain appealed the FCA's decision to the Full Court.

Awards recognised by the Full Court of the FCA

During the appeal proceedings, the focus shifted from *enforcement* of the awards to *recognition* of the awards.[6] The Full Court determined that the proceedings were recognition proceedings only, and that the court did not need to consider whether the awards were also being enforced and/or executed.

The Full Court provided guidance on the difference between the "recognition", "enforcement" and "execution" of arbitral awards:[7]

"Simplistically, recognition refers to the formal confirmation by a municipal court that an arbitral

award is authentic and has legal consequences under municipal law. Enforcement goes a step further. It refers to the process by which a successful party seeks the municipal court's assistance in ensuring compliance with the award (as recognised) and obtaining the redress to which it is entitled. Execution refers to the formal process by which enforcement is carried out."

As the proceedings related to recognition only, Spain had waived its right to rely on state immunity with respect to recognition of an award pursuant to Article 54 of the ICSID Convention. State immunity may only apply to execution of an award pursuant to Article 55 of the ICSID Convention.

The Full Court considered the distinction between "enforcement" and "execution" and reached a conclusion different to Justice Stewart at first instance. The Full Court held that the reference to "execution" of an award in Article 55 extended to "enforcement" of the award. However, as the proceedings related to recognition only, there was no need to consider immunity issues with respect to enforcement or execution of the awards.

When the Full Court sought to provide further clarification of its judgment when issuing the orders to recognise the awards, Chief Justice Allsop, on behalf of the Full Court, emphasised that the "immunity recognised by the ICSID Convention was as to execution", this being in Article 55. He also stated that:[8]

"The recognition and enforcement contemplated by Art 54(1) and (2) [of the ICSID Convention] does not extend to execution from which there may be immunity. For the purposes of s 35 [of the IAA] the order to which the party is entitled is one which gives the award the recognised status of a judgment and is enforceable as such".

On that basis, the Full Court ordered that the awards be recognised as binding on Spain, and that judgment be entered in favour of the investors in the sums set out in the awards.

State immunity on enforcement remains an open issue

In many respects, the semantic analysis of "recognition" versus "enforcement" and "execution" of an award in the Full Court's judgment has exaggerated confusion of the three concepts rather than providing clarification. Justice Stewart's analysis, which emphasised the difference between "enforcement" and "execution", was consistent with the view held by many courts in common law and civil law jurisdictions (as explained in His Honour's judgment).

Whilst there is no doubt that an ICSID award may be recognised against a foreign State by the Australian courts, the question of whether state immunity applies to the enforcement or execution of such an award remains an open issue.

Footnotes:

1 [2021] FCAFC 112.
2 [2021] FCAFC 3 and [2021] FCAFC 112.
3 ICSID Case No. ARB/13/36.
4 ICSID Case No. ARB/13/31.
5 [2020] FCA 157.
6 [2021] FCAFC 3.
7 Ibid at [26].
8 [2021] FCAFC 112 at [7].

Conclusion

As arbitration continues to grow in Australia, it is unsurprising that the Australian courts have consistently demonstrated a willingness to support arbitral proceedings.

The courts continue to consider challenging issues, such as the question of *functus officio* before the WA Supreme Court in *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* and the distinction between the "recognition", "enforcement" and "execution" of arbitral awards as considered by the FCA and the Full Court in the Spanish ICSID cases. Some of these issues remain unresolved. For example, the appeal in *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* is yet to be considered.

Whilst it is difficult to predict the types of issues that will arise in 2022, it is anticipated that, with the growing use of virtual hearings during the Covid pandemic, the Australian courts, similar to courts overseas, are likely to hear more challenges to set aside awards or the enforcement of awards on grounds of due process and natural justice. Such challenges are unlikely to be discouraged by the high threshold required by the Australian courts for such an application to succeed.

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