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Support grows for arbitration in Australia - from start to finish

Australia's attractiveness as a forum for international arbitration continues to grow following the implementation of a raft of changes to both its international and domestic arbitration legislative regimes, as well as the strengthening of support for international arbitration amongst the Australian judiciary.

Two recent cases - *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"* [2011] FCA 1371 and *Traxys Europe SA v Balaji Coke Pvt Ltd (No 2)* [2012] FCA 276 - decided under Australia's newly amended arbitration legislation provide good examples of these developments.

Key issues

This briefing gives an overview of the significant changes to the international and domestic arbitration framework in Australia, and provides a brief summary of the recent decisions against the background of this legislative reform.

For further information, please contact any of the authors listed on page 4 of this briefing.

Case one: Freezing orders in favour of a foreign arbitration

***ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"* [2011] FCA 1371**

Summary

A Swiss company successfully applied to the Australian courts for a freezing order against its Russian counterparty in relation to Australian-based assets in support of an arbitration that had just commenced. This case is the first application in Australia of the newly amended provisions in the legislation regarding the court's power to order interim measures (in this case, freezing orders over assets) in support of arbitration.

The facts

The dispute arose between a Swiss company, ENRC, and a Russian company OJSC "Magnitogorsk Metallurgical Kombinat" (MMK), over MMK's alleged multi-million dollar breach of its obligations under a long-term supply contract for the provision of bulk quantities of iron ore.

ENRC made an application to the Federal Court of Australia against MMK and its wholly owned subsidiary, called MMK-Mining Assets Management S.A. (MMK-Lux), without advance notice to MMK or MMK-Lux (ie ex parte), for freezing orders in relation to certain assets in Australia in support of the arbitration. The assets in question were a parcel of approximately 155 million shares (worth around A$700 million at the time) in an Australian publicly listed company. There was some uncertainty in the case as to whether MMK had already transferred its interest in the shares to MMK-Lux, a non-party to the arbitration. In any event, ENRC sought orders against both MMK entities.

In making the application, ENRC relied on Article 17J of the Model Law, which is given the force of law in Australia by Section 16 of the *International Arbitration Act 1974* (Cth). Article 17J of the Model Law essentially provides the court with the same power of issuing an interim measure in relation to arbitration proceedings (seated in or outside Australia) as it has with court proceedings.

Fast facts: Australia's arbitration framework and recent "upgrade"

- The *International Arbitration Act 1974* (Cth) (IAA) provides the legislative framework for international arbitral proceedings. The IAA is based on the UNCITRAL Model Law on International Commercial Arbitration.
- The IAA also gives effect to Australia's obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Australia acceded without reservation in 1975.
- In July 2010, Australia introduced a suite of amendments to the IAA through the enactment of the International Arbitration Amendment Act 2010 (Cth). The amendments updated the legislation to adopt a number of the 2006 amendments to the UNCITRAL Model Law, and other amendments to reflect international arbitration best practice.
- As the IAA incorporates the updated provisions of UNCITRAL Model Law, it provides comprehensive provisions relating to interim relief that may be granted by both the arbitral tribunal and the courts. The Australian courts may order interim measures irrespective of whether the seat of the arbitration is in Australia or elsewhere (Article 17J). The courts also have the power to enforce interim measures issued by a foreign arbitral tribunal (Article 17H).
- Australia's leading arbitral institution is the Australian Centre for International Commercial Arbitration (ACICA), which was founded in 1985 (see more at acica.org.au). ACICA has its own set of arbitration rules, which largely follow the structure of the UNCITRAL Arbitration Rules, but have also been crafted to reflect international best practice. In August 2011, updated ACICA Rules came into force incorporating revised Emergency Arbitrator Provisions. ACICA has also recently revised its Expedited Arbitration Rules, which were first published in 2008.
- In August 2010, the Australian International Disputes Centre (AIDC) opened in Sydney (with support from the Australian Government and the State of New South Wales) offering custom-built facilities for arbitration hearings, and housing a number of leading ADR providers, including ACICA.

Outcome

The Federal Court of Australia granted the orders sought against both MMK and MMK-Lux freezing – at least on an interim basis – the companies' assets in Australia up to the unencumbered value of A$850 million. ENRC was also required to pay the sum of A$30 million into court as security for its undertaking as to damages, in recognition of the market volatility of the relevant assets, ie shares.

MMK sought to contest the interim orders that had been made ex parte. However, the dispute was resolved prior to the contested hearing date.

Importance of this decision

This decision is important because it is the first time the Australian courts have made orders pursuant to Article 17J of the 2006 UNCITRAL Model Law, as recently incorporated into Australian law by the enactment of the *International Arbitration Amendment Act* 2010 (Cth).

This decision is also notable because of the scale of the relief that the court was willing to grant in circumstances where the arbitral proceedings otherwise had no connection to Australia and where one of the parties affected by the orders was not even a party to the arbitration.

Case two: Enforcement of a foreign arbitral award

***Traxys Europe SA v Balaji Coke Pvt Ltd (No 2)* [2012] FCA 276**

Summary

This case demonstrates the Australian court's support for arbitration at the other end of the life cycle of an arbitration – the recognition and enforcement stage.

The case involved an application for recognition and enforcement by a Luxembourg company of an London Court of International Arbitration (LCIA) award against its Indian counterparty. The Indian respondent company resisted the enforcement of the award in Australia, arguing (amongst other things) that it would be a violation of public policy.

The facts

The arbitration concerned a contract for the sale of metallurgical coke between the applicant (Traxys), a Luxembourg company, and the first respondent (Balaji), a company incorporated in India. Pursuant to the arbitration agreement between the parties, the arbitration was conducted under LCIA Rules.

Both Traxys and Balaji participated fully in the arbitration. The arbitral tribunal found in favour of Traxys and awarded it damages for breach of contract, together with interest and the fees and expenses of the arbitration and costs.

Post-award events

Balaji failed to pay any amount to Traxys in satisfaction of the award and commenced proceedings against Traxys in the Indian courts seeking to set aside the award or, alternatively, to have the operation of the award suspended – notwithstanding that an application to set aside an award could only properly be made at the seat of the arbitration (London in this case).

In the meantime, Traxys obtained orders from the English Commercial Court recognising the award as a judgment in England. Traxys also obtained freezing injunctions and an interim anti-suit injunction against Balaji restraining it from taking any further steps to challenge the award or the English Commercial Court proceedings in India. Balaji did not appear in the proceedings.

Australian enforcement proceedings

The Australian enforcement proceedings were commenced without advance notice to Balaji and were also accompanied by an application for urgent interlocutory relief in the form of freezing orders over certain Balaji assets in Australia.

Balaji appeared and contested the Australian enforcement proceedings arguing (amongst other things) that the court should refuse to enforce the award, as pursuant to s8(7)(b) of the IAA to enforce the award would be contrary to public policy, in circumstances where:

- there was an absence of proof that the award debtor had any assets in Australia; and
- the enforcement proceedings were brought by Traxys in Australia in apparent breach of a without notice anti-suit injunction granted by the Indian High Court and in circumstances where Balaji's application to set aside the award in India was unresolved.

In rejecting the public policy arguments put forward in this case, the Federal Court of Australia made a number of helpful statements clarifying the operation and scope of the public policy exception to enforcement in Australia, as summarised below:

- when the public policy ground for refusal is invoked by an award debtor in Australian enforcement proceedings, the court is required to consider the public policy of Australia as the jurisdiction in which enforcement is enforced (and not the public policy of any other state);
- the public policy ground is a narrow one – "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice" in the enforcement jurisdiction that will trigger the exception to enforcement; and
- the pro-enforcement bias of the New York Convention requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor.

Importance of this decision

This case is important because it defines the scope of the public policy exception (ie narrowly), and makes clear that Australian courts will not tolerate illegitimate recourse to the public policy ground.

Conclusion

In recent years Australia has undertaken a major overhaul of its international and domestic arbitration legislation with a view to enhancing Australia's attractiveness as a seat for arbitration.

The IAA has been updated to incorporate a number of the changes made in the 2006 amendments to the UNCITRAL Model Law, so as to further ensure that arbitration achieves its objectives as an "efficient, impartial, enforceable and timely" dispute resolution process. It also clearly demarcates the role of the courts in supporting that process.

Australia's domestic arbitration legislation, the uniform Commercial Arbitration Acts, have also been updated to incorporate the UNCITRAL Model Law and the updated legislation is already in force in a number of states.

Integral to the success of this amended arbitration legislation is its interpretation and application by the courts.

The cases in this briefing illustrate the Australian judiciary's positive application of that legislation and strict observance of the IAA's objects to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes – even in circumstances where the seat is outside Australia and neither of the parties are Australian.

These legislative amendments and Australian courts' support of the arbitral process can give confidence to Australian entities and foreign parties dealing with Australian entities or assets that arbitrations with an Australian element will be adequately supported by the legislative framework and courts of Australia.

Contacts

Tim Grave
Partner, Sydney

T: +61 2 8922 8028
E: tim.grave
@cliffordchance.com

Ben Luscombe
Partner, Perth

T: +61 8 9262 5511
E: ben.luscombe
@cliffordchance.com

Julia Dreosti
Senior Associate, Sydney

T: +61 2 8922 8072
E: julia.dreosti
@cliffordchance.com

Nathan Landis
Senior Associate, Perth

T: +61 8 9262 5512
E: nathan.landis
@cliffordchance.com

Laura Giddens
Associate, Sydney

T: +61 2 8922 8061
E: laura.giddens
@cliffordchance.com

Disclaimer: Clifford Chance represented MKK and Traxys in the cases detailed in this briefing.