Recent Cases

The Australian International Arbitration Act And The New York Convention of 1958

Abigroup Contractors Pty Ltd v Transfield Pty Ltd and Obayashi Corporation and Ors [1998] VSC 103.

Introduction

This case note is concerned with the New York Convention of 1958 and stay of Court proceedings pursuant to s.7 of the *International Arbitration Act* 1974 (Cth) ("IAA") or s.53 of the *Commercial Arbitration Act* 1984 (Victoria) ("CAA").

The New York Convention and the International Arbitration Act 1974 (Cth)

Part II of the IAA deals with the enforcement of foreign awards. Section 3 of Pt II, the Interpretation Section defines:

"'***Australia***' *includes the Territories;*

'***Convention***' *means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United National Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 1;*

'***Convention country***' *means a country (other than Australia) that is a Contracting State within the meaning of the Convention;*

'***court***' *means any court in Australia, including a court of a State or Territory;*

'***foreign award***' *means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the convention applies.*"

The power to stay court proceedings in Australia where there is an international arbitration agreement is contained in s.7 of the IAA. Relevantly s.7 states:

"(1) Where:

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;

this section applies to the agreement.

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter."

Section 7 of the IAA is not governed by the "Model Law". Section 7 will not be displaced by an agreement between the parties that the dispute shall be resolved otherwise than in accordance with the Model Law (refer s.21 of the IAA and LCIA Newsletter, Vol 3 No 4, November 1998 at 3 and 6).

The Case

In October of 1998 Gillard J of the Supreme Court of Victoria, (No 6620 of 1998) had to decide whether or not a cause of action brought by the Plaintiff Abigroup Contractors Pty Ltd ("AC") as against the First and Second Defendants Transfield Pty Limited and Obayashi Corporation ("T & O") should be stayed on the ground that there was an international arbitration agreement between the Plaintiff and the Defendants ("the parties").

T & O relied upon s.7 of the IAA and in the alternative on s.53 of the uniform *Commercial Arbitration Act* 1984 (Victoria) ("CAA").

Pursuant to s.7 of the IAA, the Court shall order a stay of Court proceedings. However, in accordance with s.53 of the CAA the Court has a discretion in relation to whether or not it will order a stay of Court proceedings.

The Parties to the Stay Application

There were eight parties involved in the interlocutory stay application before the Supreme Court of Victoria.

The real dispute involved four separate parties in respect of pre-contractual events, namely:

1. AC - the Plaintiff Builder - Construction Contractor.
2. T & O – the Defendant Proprietors – Designers, Project Managers and Contractors.
3. Design Consultants.
4. Geotechnical Consultants.

Background Facts

1. On 24 September 1996 T & O invited AC to submit a tender for a section of the Melbourne City Link Project known as the South Bank Interchange.
2. In February of 1997 AC entered into a form of sub-contract with T & O to execute the South Bank works for a lump sum of AUD$14.5 million ("the Works").
3. In early March of 1997 AC commenced the works with an expected completion date in January of 1999.
4. On 24 July 1998 AC issued a Supreme Court writ against T & O and the other six Defendants. AC claimed damages as against T & O.

Nature of the Court Proceedings - The Issues

1. The central issue between the parties was whether or not there was a binding and concluded contract in law containing an arbitration agreement.
2. AC asserted that there was no formal binding sub-contract in law which contained an arbitration agreement.
3. T & O contended that:
   (a) the question of contract or no contract had been answered in AC's Statement of Claim - paragraph 35, wherein AC asserted that there was a written sub-contract in law between the parties;
   (b) AC's stay application was the very proceeding that was before the Court;
   (c) it was not open to AC to deny the existence of the sub-contract because AC's cause of action was based upon the existence of the contract;
   (d) the stay application was sought with respect to AC's present causes of action in the Court.

Was There a Binding Contract in Law Between the Parties?

Gillard J stated that whether or not a binding concluded contract in law had come into existence was a question of fact. The issue requires a twofold inquiry, namely:

(a) Did the parties agree to make a contract, i.e. was there consensus *ad idem*?
(b) If the parties did agree, did the parties intend their agreement to be binding in law?

Gillard J concluded that it was not open to AC to argue that there was not in existence a binding and concluded sub-contract in law containing an arbitration agreement.

Did the IAA Apply?

The parties agreed that the conditions as identified as the "South Bank Interchange Design and Construct Sub-contract" applied to the sub-contract as pleaded by AC.

T & O relied upon s.7 of the IAA and submitted that:

(i) the words of s.7 of the IAA are mandatory;
(ii) if the relevant provisions of s.7 are satisfied, then the Court is bound to stay the Court proceedings and refer the matter to arbitration;
(iii) the Court is bound to refer the matter to arbitration unless the Court finds *"that the arbitration agreement was null and void, inoperative or incapable of being performed"* (s.7(5) of the IAA). (The facts of this case did not support a s.7(5) application.)

Both parties agreed that T & O had established the necessary statutory requirements of s.7 of the IAA. Prima facie, s.7 applied.

However, AC submitted that the wording of the conditions of the sub-contract made it clear that the parties intended that the arbitration should be conducted pursuant to the CAA.

Gillard J stated that AC's submissions raised two concerns, namely:

1. Is it open to the parties to an arbitration agreement to exclude the operation of s.7 of the IAA?
2. If it is, had the parties under the present sub-contract excluded the operation of s.7 of the IAA?

Gillard J summarised the position in relation to s.7 of the IAA as follows:

(a) s.7 of the IAA gives the right to parties to a foreign arbitration agreement to apply to a court to stay any court proceedings.

(b) s.7 does not contain any express provision precluding a party to an arbitration agreement agreeing not to apply for a stay. The IAA is silent on the issue.

(c) What s.7 does is to give the right to an entity who does not reside or is not domiciled in Australia and is party to an arbitration agreement to apply for a stay of the court proceeding.

(d) There is no suggestion that it would be contrary to public policy or that the general law precludes a party to such an agreement from covenanting not to make application pursuant to s.7 of the IAA to stay court proceedings.

(e) It follows that prima facie the parties can agree not to make an application pursuant to s.7 and a covenant to that effect should be upheld by the court. In other words, an agreement to that effect should be enforced.

(f) The question is whether there is anything in the IAA which shows the intention of Parliament to deny the right to the contracting parties to covenant not to apply for a stay?

(g) As has often been said, if the Parliament intended to exclude the right it would have been easy to have said so. It did not do so.

(h) The IAA is divided into a number of parts and each part deals with a discrete area.

(i) The long title to the IAA is -

"An Act relating to the recognition and enforcement of foreign arbitrarial awards, and the conduct of international commercial arbitrations, in Australia, and for related purposes".

(j) In Pt II the IAA gives effect to the 1958 New York Convention on the recognition and enforcement of foreign arbitrarial awards which is set out in Schedule 1 to the IAA. The IAA provides accession by Australia to the Convention.

(k) Pt II, which contains s.7 is concerned with the provisions of that Convention. Australia is a Convention country.

(l) Pt II is concerned with enforcement of foreign arbitration agreements, recognition and enforcement of foreign arbitration awards and proof of matters relating to the Convention.

(m) A perusal of Pt (11) and the Convention reveals that it does not deal with any procedural matters to be applied in the arbitration.

(n) Pt III of the IAA gives effect to the United National Commission on International Trade Law's Model Law on International Commercial Arbitration. Subject to Pt III of the IAA, the Model Law has the force of law in Australia. It is reproduced in Schedule 2. The Model Law covers a wider range of topics than the convention. Again, there is nothing in Pt III or the Model Law which precludes a party to a foreign arbitration agreement from excluding the operation of the IAA or the convention or the model law.

(o) There is nothing in the IAA which shows an intention by the Commonwealth Parliament to exclude the rights of parties to an arbitration agreement, to agree that the provisions of the IAA, convention or model law do not apply to a foreign arbitration.

(p) Indeed, AC did not contend otherwise.

(q) Further a party to any foreign arbitration agreement must make application to the court in order to stay the proceedings. It must follow that if no application is made then the section would not apply.

(r) The parties to a foreign arbitration agreement within the meaning of the IAA can, by agreement, exclude the operation of the IAA. Such a conclusion does not defeat the object of the IAA.

Have the Parties Excluded the Operation of the IAA?

AC submitted that the parties, by agreement, had excluded the operation of the IAA. The sub-contract provided the relevant ADR mechanisms for dispute resolution, namely, negotiation, mediation and arbitration. AC relied upon clause 13.5(d), which provided:

"(d) The arbitration must be conducted in accordance with the following rules and procedures:

(i) the place of arbitration must be in Melbourne, Victoria;

(ii) the parties to the arbitration are entitled to legal representation;

(iii) the arbitrator must hand down his award within one month after the conclusion of the hearing unless the parties agree to extend the time for one further period of a maximum of one month;

(iv) *the cost of the reference to arbitration and award are at the discretion of the arbitrator, but the arbitrator does not have the power to tax any award of costs made under s.34 of the Commercial Arbitration Act of Victoria;*

(v) *the rules of evidence apply to the proceedings; and*

(vi) *the Commercial Arbitration Act of Victoria applies to the arbitration except to the extent it is inconsistent with the preceding provisions of this clause.*"

Gillard J held that:

1. Clause 13.5(d) did not exclude the operation of s.7 of the IAA.
2. Section 7 of the IAA applied.
3. The procedures set out in the CAA may apply to the conduct of the arbitration.

Were T & O Entitled to a Stay of the Court Proceedings?

There was no dispute between the parties that AC's Court proceedings involved the determination of a matter that was capable of settlement pursuant to the Arbitration Agreement.

C11 of the sub-contract defined dispute *as "a dispute, difference, claim or any unresolved issue arising between the parties relating to the interpretation of the sub-contract or any matter arising under, or relating to, the sub-contract or the sub-contract works.*"

The definition is indeed extremely wide and cl 13.5 provided that any dispute must be resolved by arbitration.

s.7(2) empowers the court to stay so much of the proceeding as involves the determination of a matter that is capable of settlement by arbitration.

Clearly the wide definition of "*dispute*" covers all the claims made by the plaintiff against T & O which concerns the pre-contract negotiations and the alleged breaches of sub-contract. The claims made pursuant to the *Trade Practices Act* would also be included - see *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways* (1996) 39 NSWLR 160 and *IBM Australia Limited v National Distribution Services Limited* (1991) 22 NSWLR 466.

AC's Quantum Meruit Claim

Gillard J had to consider the question of whether or not AC's quantum meruit claims as particularised in paragraphs 102 and 124 of the Statement of Claim were covered by the Arbitration Agreement.

In two recent decisions in New South Wales, single judges have held that a quantum meruit claim fell within the dispute clause in the agreement in question. In both cases the dispute clause was extremely wide and covered a dispute concerning the contract "*or in connection therewith*". That phrase is not found in the dispute definition in the present sub-contract.

The New South Wales decisions are *O'Connor v Leaw Pty Ltd* (1997) 432 NSWLR 285 and *Elkateb v Lawindi* (1997) 42 NSWLR 396.

The question is whether the phrase "*or relating to the sub-contract or the sub-contract works*" is wide enough to cover a true quantum meruit claim.

The parties did not make submissions in relation to the question of quantum meruit and accordingly Gillard J was not prepared to conclude that AC's quantum meruit claims were covered by the arbitration agreement. However, his Honour said that nothing would be gained from a practical point of view to stay all the causes of action between the parties and leave the quantum meruit claims to proceed in the Court. His Honour encouraged the parties to enter into an agreement to ensure that AC's quantum meruit claims would be dealt with in the subsequent arbitration proceedings.

The Commercial Arbitration Act 1984 (Victoria) - ("CAA") - The Alternative Legislation

T & O relied upon s.7 of the IAA and in the alternative s.53 of the CAA. The Court has a discretion whether or not to grant a stay of Court proceedings pursuant to s.53 of the CAA. The substantive dispute involved four separate parties in respect of the pre-contract events. His Honour concluded that the issues concerning the four parties were inextricably bound up and that one tribunal should hear the causes of action based on the pre-contract events, and further, there was no sufficient reason why the matter should not be referred to arbitration. However, if the application had to be decided under s.53 of the CAA, Gillard would not have stayed the Court proceedings.

Conclusion

The Court granted a stay of the Court proceedings pursuant to s.7 of the IAA. Australian Courts are very supportive of the arbitral process. Section 7 of the IAA stands alone and is not governed by the Model Law and/or the opting out provisions of s.21 of the IAA.

- John Amor-Smith, Barrister-at-Law.