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Australian Courts Aligned with the UK in Reluctance to Depart from Decisions of the Seat Court on Asserted Procedural Defects when Enforcing Foreign Arbitral Awards

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The Full Court of the Federal Court of Australia (**the Court**) recently upheld a decision enforcing an arbitral award made by three London arbitrators (*Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109). The Court dismissed the appeal confirming that the arbitrators did not deny the appellants procedural fairness and did not breach the rules of natural justice as the appellants had a reasonable opportunity to present their case. It is notable that the English High Court of Justice (**the English Court**), being the court of the seat of the arbitration, had previously refused an application to set aside the award based on similar arguments.

This decision illustrates that:

- Australian courts will be reluctant to refuse enforcement of an arbitral award on the basis of a party being unable to present its case except in extreme circumstances; and
- when asked to enforce awards, Australian courts will generally consider it inappropriate to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration.

Background

The dispute arose between the parties in relation to a Purchase Agreement whereby the respondent, Coeclerici Asia Pte Ltd (**Coeclerici**), agreed to purchase metallurgical coke from one of the appellants, Gujarat NRE Coke Limited (**Gujarat**). In accordance with the Purchase Agreement, Coeclerici made a prepayment to Gujarat, however, Gujarat failed to then deliver the coke. In these circumstances, the Purchase Agreement provided for the return of the prepayment amount to Coeclerici – this obligation was guaranteed by the second appellant, Mr Jagatramka.

Gujarat failed to return the entire prepayment amount and as a result Coeclerici commenced arbitration proceedings against Gujarat and Mr Jagatramka.

Shortly before the hearing was scheduled to commence, the parties entered into another agreement under which the arbitration was to be suspended in order to allow Gujarat an opportunity to repay the outstanding sums (**the Payment Agreement**). Importantly, the Payment Agreement specified that:

- Gujarat and Mr Jagatramka unequivocally admitted liability for the residue of the prepayment amount; and
- if repayment was not made in accordance with the agreement, Coeclerici would be entitled to an immediate consent award, without the need for any pleadings or hearings, for, amongst other things, the outstanding amounts.

Gujarat failed to pay the outstanding repayment amounts in accordance with the Payment Agreement.

On 4 February 2012 Coeclerici asked the arbitrators to proceed to make an award. The arbitrators responded on the same day and gave Gujarat and Mr Jagatramka until close of business on 5 February 2012 to submit reasons as to why the arbitrators should not proceed to make the reward as requested. On 7 February 2012 solicitors for Gujarat and Mr Jagatramka put forward some reasons, in outline, as to why the award should not be made, including the assertion of an implied term in the Payment Agreement. The next day they asked for a reasonable opportunity to put detailed submissions. No request was made for the opportunity to tender evidence and the solicitors did not articulate how much time was required to present fully developed arguments to the arbitrators. On 11 February 2013, the arbitrators said that having considered the reasons put forward by the parties they intended to proceed to an award and on 14 February 2013 the award was made in favour of Coeclerici.

Gujarat and Mr Jagatramka sought unsuccessfully to challenge the award in England under s 68 of the English Arbitration Act on the basis that the tribunal's conduct in proceeding to issue an award constituted a serious irregularity.

The Federal Court of Australia allowed Coerclerici's application to enforce the award under s 8(3) of the International Arbitration Act (Cth) 1974 (the Act).

Reasonable opportunity to be heard

On appeal to the Court, Gujarat and Mr Jagatramka claimed that the primary judge was wrong in allowing Coeclerici to have the award enforced in Australia, asserting that the court should refuse to enforce the award under the Act. Relevantly, the Act provides that a court may refuse to enforce a foreign award if:

- a party proves to the satisfaction of the court that that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings (s8.5(c)); or
- if the Court finds that to enforce the award would be contrary to public policy, which includes circumstances where a breach of the rules of natural justice occurred in connection with the making of the award (ss 8(7)(b) and 8(7A)).

The Court agreed with the primary judge and the English Court in finding that Gujarat and Mr Jagatramka had been given a reasonable opportunity to be heard. The consequence of a failure to pay under the Payment Agreement was not a referral of a dispute to a separate or different arbitration. As such, the arbitrators were entitled to resolve the issue in the arbitration by such procedure as they chose as long as it gave a fair and reasonable opportunity to Gujarat and Mr Jagatramka to put their case.

The Court dismissed the argument that the arbitrators should have given Gujarat and Mr

Jagatramka more time to develop their argument that there was an implied term in the Payment Agreement. The Court commented that there is a clear relationship between the quality of the point being raised on the one hand, and the length of time to be given and the procedure to be employed to resolve the point on the other, and in this case the assertion of an implied term was hopeless.

The Court was damning of the actions of Gujarat and Mr Jagatramka on the basis that this dispute involved an international arbitration about the payment of a debt admitted to be due and outstanding for months. Accordingly, Gujarat and Mr Jagatramka were not entitled to 'some leisurely expanse of time to think up and develop points.' The Court noted that Gujarat and Mr Jagatramka had over a week to articulate their arguments. Furthermore, the Court said that the arbitrators were obliged to act with proper despatch and while another arbitrator might have put the parties to a strict timetable to exchange evidence and submissions these arbitrators 'had the courage of their convictions as to the hopelessness of the points raised. They thought they had given the appellants a reasonable opportunity to explain their apparent default.'

Relevance of the decision of the seat court in Australian enforcement

At first instance, the Federal Court judge held that the question of whether Gujarat and Mr Jagatramka had a reasonable opportunity to present their case was decided by the English Court. Consequently, the issue could not be re-litigated in Australia as there was an issue estoppel.

On appeal Gujarat and Mr Jagatramka asserted that no issue estoppel arose as the English Court considered an application to set aside the award pursuant to s68 of the English Arbitration Act 1996 and the Australian court was asked to consider an application to refuse enforcement under the Act therefore the courts had not decided the same issue.

Although the Court observed that there were differences in the exercise before the two courts, in considering whether there was a serious irregularity, the English Court did decide the key issue that was before the Australian Courts in concluding that Gujarat and Mr Jagatramka had been given a reasonable opportunity to present their case.

The Court declined to determine whether issue estoppel operates in this context and there is no binding authority in Australia clearly resolving the issue. However, the Court agreed with the primary judge that it would be generally inappropriate for the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration. The Court endorsed and applied the observation made by Coleman J in the English decision of *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 311 as to the weight to be given to the views of the supervising court of the seat of the arbitration.

The Court found that there was nothing in this case that fell within one of the exceptional cases identified by Colman J as justifying departing from the decision of the court of the seat of the arbitration.

This decision leaves the door open for parties to assert that issue estoppel arises where a foreign court has made a determination on the same issues in an arbitration context. Further, the case illustrates that regardless as to whether issue estoppel arises, Australian courts will be reluctant to intervene with findings made by the court the seat of the arbitration, provided that there is nothing exceptional justifying a departure from the foreign court's decision.

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