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Federal Court of Australia dismisses challenge to enforcement of foreign arbitral awards made in London

Bronwyn Lincoln (Herbert Smith Freehills LLP) · Sunday, June 29th, 2014 · Herbert Smith Freehills

Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636

Justice Foster of the Federal Court of Australia handed down judgment on 17 June 2014 in an application for the enforcement of three foreign arbitral awards. The key issue for determination before the court was whether the applicant, Armada (Singapore) Pte Ltd (Under Judicial Management) (**Armada**), had satisfied the requirements of s 9 of the *International Arbitration Act 1974 (Cth)* (**IAA**). The court also considered whether one of the awards contravened public policy, therefore rendering it unenforceable in Australia pursuant to the provisions of the IAA.

The matter arose out of a shipping contract between Armada (based in Singapore) and Gujarat NRE Coke Limited (**Gujarat**). Armada claimed that Gujarat committed a breached of the contract terms. The contract contained an arbitration clause in the following terms:

> *If any dispute or difference should arise under this Charter, same to be referred to three parties in the City of London, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are members of the Institute of Arbitrators in London.*

Arbitration was commenced by Armada pursuant to this clause and the hearing took place in London in July and September 2011 and March 2012. Three separate awards were made by the arbitral tribunal as a consequence of these hearings. Armada sought to enforce these awards in Australia.

The first determination of the arbitral tribunal was as to its jurisdiction; under the English *Arbitration Act 1996,* the tribunal had power to rule on its own substantive jurisdiction. It did so in this case, concluding that it had jurisdiction. Gujarat contended both before the tribunal and again before the Federal Court, that the appointment of two of the arbitrators was defective because they were not 'commercial men' within the meaning of the arbitration clause in the contract. The contention was dismissed by the tribunal, it finding that Gujarat had waived any defects in the

appointment of the arbitrators and was therefore estopped from denying that the tribunal was improperly constituted. The challenge was also too late under the terms of the UK Act.

The second determination of the arbitral tribunal concerned the claims that Gujarat had breached the shipping contract. If the tribunal found that the contract had been breached, it was also charged with determining the basis on which damages would be calculated. The tribunal, after considering a detailed chronology of the events leading to the commencement of the arbitral proceedings, found that Gujarat was in breach of the contract and set out the manner in which damages were to be assessed.

In its third award, the arbitral tribunal determined the quantum of Armada's entitlement to damages.

Gujarat resisted enforcement of all three of the arbitral tribunal's awards. It relied on five grounds.

First, it claimed that because two of the arbitrators were not 'commercial men', Armada could not satisfy s 9 of the IAA. Secondly, it claimed that, for the same reason, the composition of the tribunal was not in accordance with the parties' agreement.

Thirdly, Gujarat contended that the second award had not become binding because it purported to bind the parties in relation to future contractual damages at a time when actual damage had not been suffered. Fourthly and consequently to ground 3, Gujarat claimed that enforcement of the second award would be contrary to public policy (s 8(7)(b) of the IAA).

Finally, Gujarat claimed that the contract between it and Armada was a 'sea carriage document' within the meaning of s 11 of the *Carriage of Goods by Sea Act 1991 (Cth*) so that *the contract was of no effect and the arbitrators had no jurisdiction to render Gujarat liable for damages.*

Foster J dealt with Gujarat's submission pursuant to the *Carriage of Goods by Sea Act 1991 (Cth)* as a preliminary matter. Relying on a decision of the Full Court of the Federal Court of Australia handed down during the currency of the litigation between Armada and Gujarat, Foster J rejected Gujarat's submission.

In relation to Gujarat's complaint as to the constitution of the tribunal, Foster J relied on his Honour's own reasoning in the earlier case of *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161 quoting both s 8 and s 9 of the IAA and noting that:

> *Section 9(1) of the Act obliges an applicant who seeks to enforce a foreign award under s 8 of the Act to produce the duly authenticated original award or a duly certified copy of that award and the original arbitration agreement under which the award "purports" to have been made or a duly certified copy of that agreement.*
> *[…]*
> *… the production of those documents in the present case constitutes prima facie evidence of:*
> *(a) the fact that each award was made as it purports to have been made;*
> *(b) the subject matter of each award; and*
> *(c) the fact that each award purports to have been made pursuant to cl 32 of the charterparty.*

Foster J found that Armada had *established to a prima facie level that each of the three Awards is a foreign award within the meaning of that expression in s 8(1) of the IAA and that [s]ubject to Pt II of the IAA, each of those Awards is binding upon Armada and Gujarat by virtue of the IAA for all purposes.*

His Honour then observed that in order to resist enforcement, Gujarat must make out one of the grounds specified in s 8(5)(e) and (f) and s 8(7), being the subsections relied on by that party.

As to the question of whether the appointed arbitrators were 'commercial men' and the tribunal therefore properly constituted, Foster J noted that the court was not bound to follow or apply the findings of the arbitrators in this respect. His Honour then examined jurisprudence where the question of 'commercial men' had been before the court. His Honour concluded, having also examined the curriculum vitae of each of the two arbitrators, that each did satisfy the definition of 'commercial men' for the purpose of the arbitration clause. His Honour commented further that:

> *In effect, Gujarat continued to participate in the arbitration for some time after the arbitrators had determined that they had substantive jurisdiction to proceed with the arbitration. It was only after the publication of the Second Award that Gujarat took steps to extricate itself from the arbitration. It seems quite clear to me that it had decided to participate in the arbitration after the initial ruling on jurisdiction in order to see whether it could procure a favourable outcome on the issues of substance in the arbitration. It was only in the face of an unfavourable outcome that it decided to attempt to resurrect the point which it now takes concerning the composition of the tribunal.*

Gujarat's argument in respect of the declaration comprising the second arbitral award centred on a contention that it would be contrary to principle to make a declaration with respect to damages for future shipments. His Honour observed that since the commencement of the proceedings in Australia, at least one further award had been rendered by the arbitral tribunal; in this context, and without further explanation, Foster J declined to give effect to the declaration of which Gujarat complained, but to give Armada liberty to apply to amend its Originating Application so as to seek to enforce any additional awards made by the tribunal after the date of his Honour's judgment. His Honour added that consistent with other decisions his Honour had given on the question or public policy in the context of enforcement *I do not think that enforcing a declaration in the terms of the declaration made in par 224(3) of the Second Award would be contrary to the public policy principles of Australia. The mere fact that enforcing such a declaration might not be consistent with principle's developed in Australia for the exercise of an Australian Court's discretion to make declarations would not, of itself, be sufficient to constitute a reason for refusing to enforce the award on the grounds that to do so would be contrary to public policy.*

In addition to hearing and determining the application for enforcement of the foreign arbitral awards, the court also had before it an application by Gujarat to vary freezing orders made earlier in the proceeding. Foster J refused to do so.

The decision of the Federal Court is encouraging for international parties engaged in business in or touching Australia; it is reflective of the pro-arbitration approach of not only the Federal Court of Australia, but of each of the state Supreme Courts, particularly the Victorian Supreme Court and

the Supreme Court of new South Wales. It also offers further guidance on the meaning of ‘public policy’ within the IAA since the amendment of that Act in 2010.

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